

***United States Court of Appeals
for the
District of Columbia Circuit***



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UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

OCTOBER TERM, 1939

561

No. 7546

SPECIAL CALENDAR

JAMES A. FARLEY, POSTMASTER GENERAL OF THE
UNITED STATES, APPELLANT

vs.

EDWIN H. ABBETMEIER, FRANK A. ABEL, ET AL.,
APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

FILED NOVEMBER 10, 1939

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

OCTOBER TERM, 1939

No. 7546

JAMES A. FARLEY, POSTMASTER GENERAL OF THE
UNITED STATES, APPELLANT

vs.

EDWIN H. ABBETMEIER, FRANK A. ABEL, ET AL.,
APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

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DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 1935

EDWIN H. ABBETMEIER, FRANK A. ABEL, ET AL., PLAINTIFFS
vs.JAMES A. FARLEY, POSTMASTER GENERAL OF THE UNITED STATES,
DEFENDANTUNITED STATES OF AMERICA,
District of Columbia, ss:

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Civil Action, File No. 1935

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 PLAINTIFFS

vs.

JAMES A. FARLEY, POSTMASTER GENERAL OF THE UNITED STATES,
 POST OFFICE DEPARTMENT, WASHINGTON, D. C., DEFENDANT

Complaint for declaratory judgment and mandatory relief

1. This is an action against the defendant James A. Farley, as Postmaster General of the United States, and the jurisdiction of this Court is invoked under the provisions of Section 400, Title 28, United States Code (1934 edition), and other applicable statutes.

2. Plaintiffs have, for a number of years, been employees of the United States in the Railway Mail Service, each of plaintiffs having been appointed to said service several years prior to June 14, 1934. Prior to June 14, 1934, in accordance with the statutes

regulating the appointment and promotion of railway postal clerks (Act of February 28, 1925, 43 Stat. 1062), the plaintiffs had progressed to Grade 5 and the salary of each was fixed at Two thousand four hundred fifty dollars (\$2,450.00) per annum, pursuant to the provisions of said statutes, each of plaintiffs having theretofore performed a total satisfactory service of 306 days in the next lower grades. The offices of the Railway Mail Service in which the plaintiffs were then, and since have been, employed, were, prior to June 14, 1934, known and designated as Class B terminals.

3. After being promoted to Grade 5, as aforesaid, plaintiffs continued to render, and have always rendered, satisfactory service as railway postal clerks, and were entitled to continue to hold their ratings and classifications as Grade 5 railway postal clerks, and plaintiffs are still entitled to be so classified.

4. Notwithstanding the rights conferred upon the plaintiffs by law, as aforesaid, the defendant, through his subordinate officers, agents, and employees, did thereafter cause the plaintiffs to be demoted and reduced to Grade 4, contrary to law, and the plaintiffs thereafter were erroneously classified on the records of the Post Office Department as Grade 4 railway postal clerks, and their salaries were reduced from Two thousand four hundred fifty dollars (\$2,450.00) per annum to Two thousand three hundred dollars (\$2,300.00) per annum. The dates on which the plaintiffs were so unlawfully reduced in grade and salary are shown on the records of the Post Office Department, and most of such dates occurred between September 1, 1935, and April 1, 1938. Many of the plaintiffs were required to, and did, on orders from their superior officers in the Railway Mail Service, sign statements to the effect that they consented to such reductions, but said reductions were, in fact, not voluntary on the part of the plaintiffs, and said statements signed by said plaintiffs were signed under duress and compulsion.

5. The cases of these plaintiffs are substantially the same as the cases of the plaintiffs in the causes which were, on February 7, 1939, terminated by judgments of this Honorable Court, and which were entitled "U. S. ex rel. Ricci, et al., vs. Farley, Law Nos. 89858-89862," inclusive. During the time that said prior suits were pending plaintiffs herein understood, and were led to believe that said actions would be treated and regarded by the proper officials of the Post Office Department, as test suits or class actions, and that the defendant, through his proper subordinate officers, would, after the decisions of this Honorable Court in those cases, apply to these plaintiffs the rulings or decisions of the Court in those cases. The defendant has failed to do this and has, through certain of his subordinate offi-

cers, informed these plaintiffs that they must institute litigation in order to be restored to their proper grade and salary classification.

6. The reductions of the plaintiffs in grade and salary, as aforesaid, were not caused or occasioned by any misconduct or fault of plaintiffs or any of them, nor were their said reductions in any way voluntary on their part. After said reductions in grade and salary, the plaintiffs were required to perform the same work and duties, pursue the same studies, and meet the same requirements and conditions, as were required of them prior thereto when they were classified as Grade 5 railway postal clerks.

Wherefore, plaintiffs demand judgments as follows:

(1) That this Honorable Court adjudge and declare the rights and legal relations of the plaintiffs, involved in this controversy, pursuant to the Act of Congress approved June 14, 1934 (48 Stat. 955, c. 512, 28 U. S. C. sec. 400).

(2) That this Honorable Court declare that plaintiffs are entitled to be classified by the Postmaster General in Grade 5 of the Railway Mail Service, and that it is the duty of the Postmaster General to so classify plaintiffs, and to fix the salaries of plaintiffs as Grade 5 clerks in the Railway Mail Service, as of, and from, the dates shown on the records of the Post Office Department to be those on which their respective reductions to Grade 4 occurred.

(3) That this Honorable Court declare such consequential or further rights of plaintiffs as to it may seem just and proper.

(4) That, by appropriate order or orders of this Honorable Court, the defendant, James A. Farley, Postmaster General of the United States, be commanded and required, as
12 such Postmaster General, to classify the plaintiffs, and fix their salaries, as Grade 5 clerks in the Railway Mail Service, as of, from, and after, the respective dates of their reductions in grade.

(5) That plaintiffs be granted such other and further relief as to the Court may seem just and proper and the nature of the cases may require.

RHODES, KLEPINGER & RHODES,
By: (Signed) ROBERT F. KLEPINGER,
Attorneys for Plaintiffs.

13 *Memoranda*

March 6, 1939. Summons to Answer issued and served.

May 5, 1939. Answer of defendant, James A. Farley, Postmaster General, filed and served.

14 *Amended answer of defendant, James A. Farley,
Postmaster General*

Filed May 25, 1939

* * * * *

FIRST DEFENSE

The Court lacks jurisdiction (a) over the subject matter of this action, (b) over the defendant in the official capacity in which he is sued, and (c) over the United States which is sued in effect.

SECOND DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

THIRD DEFENSE

1. Paragraph 1 of the complaint consists entirely of contentions or conclusions of law, all of which are controverted, with the exception that it is conceded that this action is against the defendant as Postmaster General of the United States.

2. The defendant admits the allegations of fact contained in Paragraphs 2 and 3 of the complaint, except he denies that the plaintiffs are entitled to be classified as Grade 5 railway postal clerks, and except as qualified by Paragraphs 3, 6, and 7 hereof.

15 3. The defendant denies the allegations of fact contained in Paragraph 4 of the complaint insofar as they relate to his personal or official actions; denies the same upon information and belief insofar as they relate to the actions of his subordinates; except it is admitted that at various dates after September 1, 1935, plaintiffs were reclassified as Grade 4 railway postal clerks and that the plaintiffs did sign papers purporting to request such reclassification in preference to transfers from the terminals to other organizations of the railway mail service.

4. The defendant denies the allegations of Paragraph 5 insofar as they relate to his personal or official actions; denies the same upon information and belief insofar as they relate to the actions of his subordinate officers; and alleges that he is without knowledge or information sufficient to form a belief as to the truth of allegations relating to the plaintiffs' states or conditions of mind or understandings with others; all as qualified by Paragraph 6 hereof.

5. The defendant admits that the reclassification of the plaintiffs in grade and salary was not because of misconduct and that they now performed the same work and pursue the same study under the same requirements and conditions which prevailed when they were classified as Grade 5 railway postal clerks (there being no difference between the classifications in this regard), except as qualified by Paragraph 7 hereof; but defendant denies each and every other allegation contained in Paragraph 6 of the complaint.

6. The defendant avers that insofar as he participated in, or authorized, reclassification of the plaintiffs from Grade 5 to Grade 4 he did so with the understanding and under the belief

16 that plaintiffs had voluntarily chosen to be reclassified in order to remain in the terminal railway post office from which he had ordered that they be transferred to other positions in the railway mail service; that in authorizing such reclassifications he had no intention or desire to induce or coerce any clerk to apply for reduction in rank or salary; that upon the decision of this Court in the cases entitled *United States ex rel. Ricci, et al., v. Farley, etc.*, Law Nos. 8958-8962, consideration was given to the question of extending the same relief to other clerks who might be in similar situations; that such consideration was in progress at the time this action was commenced, but that no decision had yet been reached concerning such matter; that it has been decided that if and when each or any of the plaintiffs herein (but within a reasonable time hereafter) submits to the Post Office Department a statement under oath to the effect that he or she did not freely, and without compulsion, choose to remain in the terminal at Grade 4 rather than be transferred to a Grade 5 vacancy out of the terminal, such plaintiff will be restored to Grade 5 without the necessity of further action upon his or her part and will be transferred to Grade 5 position out of the terminal as soon as a vacancy arises; provided that any such restoration will not be intended or considered to constitute a waiver of any defense which either the United States or this defendant may have as to any claim for compensation, in addition to that which the plaintiffs have received, for past services, including the defense stated as the Fifth Defense hereof; provided, further, that such decision does not apply to the plaintiffs named in Paragraph 7 hereof for the reasons mentioned therein; and that appropriate instructions have been issued to carry such decision into effect.

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7. The following plaintiffs are not affected by the decisions mentioned in Paragraph 6 hereof for the reasons, among others, that:

(a) The following-named plaintiffs were reclassified to Grade 4 on the dates indicated and were separated from the service on the dates indicated, the cause of such separation being shown in each case—

Name	Reclassified to grade 4	Separated effective	Cause of separation
Urbane S. Carney.....	11- 1-35	2-17-38	Retired.
James M. French.....	6-16-35	12-14-37	Removed for misconduct.
Walter D. Hubley.....	10- 1-35	1-31-38	Retired.
T. Emory Myers.....	10- 1-37	1-31-39	Resigned.
Farragut Owens.....	12- 1-34	3-31-38	Retired.
Ernest L. Stowe.....	12-16-35	10-31-38	Retired.

(b) The plaintiffs listed below, who were formerly assigned to railway post office terminals at Grade 5, are now occupying Grade 5 positions in organizations of the Railway Mail Service, the effec-

tive dates of their reclassification to Grade 4 and the effective dates of their reclassification to Grade 5 being shown—

Name	Grade 4	Grade 5
Raymond Apple	10- 1-35	6- 1-39
Alpheus E. Baker	10- 1-35	3- 1-39
David G. Barnes	10- 1-35	4- 1-36
Oliver M. Bradshaw	10- 1-35	6- 1-37
John H. Brown	10-16-35	6- 1-39
Clarence J. Burley	12-16-35	12- 1-38
James M. Clayton	10- 1-35	4- 1-39
William F. Cole	10- 1-35	1-18-38
Roy W. Cudmore	5-16-35	9- 1-38
De L. M. Cupp	6-16-35	10- 1-35
Clement H. Davenport	3-16-35	4- 1-38
Joseph R. Finney	5-16-35	6- 1-39
David Galane	4-16-35	12-10-35
Clarence W. Garland	10- 1-35	11- 8-38
Samuel H. Hadley	3- 1-35	9- 1-38
Murdock Hall	5-16-35	9- 8-36
James A. Holt	10- 1-35	12- 7-38
Otto C. Huffman	6-16-35	7- 1-38
18 Francis H. Johnston	10- 1-35	6- 1-39
William H. Kammann	10-16-35	6- 1-39
George H. Keenan	10-16-35	9- 9-38
Archie L. Kendall	10-16-35	2- 2-38
Ernest L. Kief	10- 1-35	11- 1-37
Ole B. Kilen	3- 1-35	5-18-38
Lloyd A. Kinyon	10- 1-35	11- 1-38
Harold A. Lewis	12- 1-35	1- 1-39
Walter C. Lowman	10- 1-35	5- 1-37
Lester E. Pike	10- 1-35	6- 1-39
Nicholas A. Plenchner	3- 1-36	5- 3-39
Edward A. Point	3-16-35	6- 1-39
Leland S. Rackliffe	10-16-35	10- 1-38
Lester Radlow	11- 1-35	6- 1-39
John E. Reuss	10- 1-35	4- 4-38
Charles R. Rose	10-16-35	4- 1-39
Melvin L. Sorem	10-16-35	12- 1-38
Leslie R. Talbott	8- 1-35	12- 1-38
Jervis N. Tittensor	11- 1-35	8- 2-37
James A. Washington	7- 1-35	4- 1-39
Elias W. T. Whitlock	7- 1-35	4- 1-39
Irving E. Willett	10- 1-35	5- 1-38
John Ziegler	4- 1-35	10- 1-38

(c) The following-named plaintiffs are now in Grade 6 positions in the Railway Mail Service, the dates of their reclassifications to Grades 4 and 5 being shown—

Name	Grade 4	Grade 5
John A. Carson	10- 1-35	11- 1-37
Charles R. Rose	10-16-35	4- 1-39
Anthony Haase, Jr.	11- 1-35	4- 1-39

(d) The following-named plaintiffs were at no time reclassified to Grade 4 in the terminals but occupying other positions at Grade 5 were reclassified to Grade 4 at their own requests for the purpose of obtaining transfers to the terminals, the effective date of such transfers being shown—

Name	Effective date of transfer
19 Charles E. Bell	3-1-36
Edward M. Bryner	1-1-36
Oscar Hartman	12-1-35
Thomas F. Herlihy	2-1-36
Henry M. Igou	9-1-35
Frank W. Joesten	9-13-37

Name	Effective date of transfer
Errol C. Jump	12-1-35
Joseph W. Kreiner	12-1-35
Fred L. McChesney	11-1-35
William T. Oliver, 3rd	8-1-35
Osmer C. Rose	12-1-35
Frank L. Simpson	11-1-35
Edward G. Stringer	4-1-38
Leslie R. Talbott	8-1-35
Clive J. York	11-1-35
Dechland V. Young	6-1-36

(e) The following named plaintiffs were ordered transferred to specific Grade 5 positions out of the terminals and, upon their requests for reclassification to Grade 4 in order to remain in the terminals, such transfers were revoked and they were reclassified accordingly, the dates of such transfers and the dates of the revocations of such transfers being shown—

Name	Transfer arranged	Date of revocation
Oliver M. Bradshaw	9-11-35	9-23-35
Robert E. Goldman	10-24-35	11-13-35
George A. Kalmbacher	10-24-35	11- 9-35
Frederic M. Metzger	9-23-35	9-30-35
Ralph Woodruff	11-27-35	12-23-35

(f) The following named plaintiffs were applicants for transfer to Grade 5 positions out of the terminals, but when recommended for transfer, and before orders could be entered effecting their transfers, they withdrew their applications and requested to be permitted to remain in the terminals at Grade 4—

John H. Bowman	Alfred S. Morgan
Arthur A. Lane	Buren Roberts
Thomas E. Leach	Ernest L. Stowe

20 (g) The plaintiff Lewis H. Young was reduced from Grade 5 to Grade 4 for disciplinary reasons, effective September 1, 1934; plaintiff Henry Blumfeld, having previously been reclassified at Grade 4, was reduced for insubordination and reassigned as a laborer on November 1, 1938, which position he now occupies; and plaintiff Alfred S. Morgan was, upon his own request, on account of his ill health, reduced, effective July 1, 1936, to the position of nondistributor at Grade 3, which position he now occupies.

FOURTH DEFENSE

The plaintiffs are estopped from contesting the legality of their reclassification at Grade 4 in this action by reason of their request for, participation in, long acquiescence in, and acceptance of the benefits of such reclassification, and the plaintiffs are barred by their laches from any right to the relief demanded in the complaint.

FIFTH DEFENSE

That insofar as the plaintiffs demand that the defendant be ordered to classify them, and fix their salaries, as Grade 5 clerks in the Railway Mail Service, as of, from and after, the respective dates of their reductions in grade, or request declaratory judgment regarding their right thereto, the plaintiffs are guilty of laches in having refrained from asserting their claims until the filing of this action; and by such laches and by acquiescence in their reassignments for a period of over three years, they are estopped from asserting any right which they might otherwise have had, to payment of compensation for past services, in addition to
 21 amounts already paid, by reason of the additional, duplicated expenses and the disruption of fiscal arrangements which would result therefrom, against the rights and interests of the United States.

Wherefore the defendant prays that this action be dismissed with proper costs and charges.

SAM E. WHITAKER,
Assistant Attorney General,

DAVID A. PINE,

C. S. D.,

United States Attorney,

W. S. WARD,

Special Assistant to the Attorney General,

HOWARD BOYD,

C. S. D.,

Assistant United States Attorney,

ENOCH E. ELLISON,

Attorney, Department of Justice,

Attorneys for the Defendant.

VINCENT M. MILES,

E.,

Solicitor, Post Office Department,

CALVIN W. HASSELL,

E.,

Assistant Solicitor, Post Office Department,

Of Counsel.

22

Defendant's motion for judgment

Filed June 13, 1939

* * * * *

The defendant moves the Court as follows:

1. To enter summary judgment dismissing the action as to each plaintiff upon the ground that the pleadings and admissions on file, together with the affidavits filed in support hereof, show

that there is no genuine issue as to any material fact and that the defendant is entitled to such judgment as a matter of law;

2. To enter judgment on the pleadings dismissing the action as to each plaintiff upon the ground that the complaint fails to state a claim against defendant upon which relief can be granted; and

3. For such other action favorable to the defendant as may be appropriate under Rule 56 of the Rules of Civil Procedure.

In support of this motion the defendant invokes, and adopts by this reference, each of the defenses contained in the amended answer, and in support of his position that a summary judgment should be entered, particularly relies upon the following grounds:

23 (a) That the plaintiffs have not sought to exhaust adequate administrative remedies available to them;

(b) That the case is moot as to the majority of the plaintiffs, and that the remaining plaintiffs were properly reclassified to Grade 4 upon their own requests; and

(c) That the plaintiffs are guilty of unjustified delay in asserting their claims, to the prejudice of the United States.

SAM E. WHITAKER,

Assistant Attorney General,

DAVID A. PINE,

United States Attorney,

W. S. WARD,

Special Assistant to the Attorney General,

HOWARD BOYD,

Assistant United States Attorney,

ENOCH E. ELLISON,

Attorney, Department of Justice,

Attorneys for the defendant.

VINCENT M. MILES,

Solicitor, Post Office Department,

CALVIN W. HASSELL,

Assistant Solicitor, Post Office Department,

Of Counsel.

24 *Affidavit of James A. Farley, Postmaster General*

Filed June 13, 1939

* * * * *

CITY OF WASHINGTON,

District of Columbia, ss.

James A. Farley, being first duly sworn, from personal knowledge refreshed and confirmed by official records of the Post Office Department, says:

That he is now, and has been since March 4, 1933, Postmaster General of the United States and that the Railway Mail Service is a part of the Postal System;

That for some years prior to June 14, 1934, the question of whether the railway post office terminals, many of which are located in the same buildings as the larger city post offices, should be maintained as a part of the Railway Mail Service, or whether the work performed in those terminals should be assigned to the city post offices, had been given considerable study;

That affiant caused an investigation of this matter to be made by post office inspectors and later had the question studied by a committee of division superintendents of the Railway Mail Service;

That the necessity for this study was occasioned by the dissatisfaction which arose due to the fact that post office clerks performing practically the same duties and in many instances in the same buildings in which the terminals are located were receiving a maximum of \$2,100 per annum whereas the terminal railway post office clerks were receiving a maximum of \$2,450 per annum;

That as a result of the aforesaid study it was decided by affiant that the best interests of the Postal Service required that such disparity be reduced if not eliminated entirely;

That it was further concluded that the most satisfactory way to accomplish such result would be for the Department to recommend to the Congress that it pass a terminal reclassification act whereby promotions of clerks in the terminals would be limited to Grade 3 at \$2,150 per annum instead of to Grade 5 at \$2,450 per annum, and that clerks already classified at higher grades should be transferred to other organizations in the Railway Mail Service;

25 That thereafter, affiant was advised that representatives of the railway mail clerks' organization had objected to fixing the maximum at Grade 3 and that a compromise had been proposed by the representatives of the clerks' organization and the officials of the Department whereby the proposed act would provide for successive promotions in the terminals to Grade 4 at \$2,300 per annum and that affiant agreed to such change;

That appended hereto is Senate Report No. 1162, Calendar 1237, to accompany H. R. 9392, 73d Congress, 2nd Session, which quotes verbatim House Report No. 1430, accompanying H. R. 9392, 73d Congress, 2nd Session;

That thereafter the Terminal Reclassification Act was passed by the Congress and approved on June 14, 1934 (39 U. S. C. 618a);

That while the Department, under the provisions of the Act of August 24, 1912 (39 U. S. Code 624), was deemed to have authority to transfer railway postal clerks to other organizations in the Railway Mail Service, it was realized that the arbitrary transfer of Grade 5 clerks from terminals without consulting their wishes might impose hardships upon some of them, and it was

therefore decided to follow the same plan in reassigning these clerks as was followed when a similar situation arose under the Reclassification Act of August 24, 1913 (39 U. S. Code 608), under which clerks would be given the privilege of requesting reclassification to Grade 4 in order to avoid transfer to other organizations if they preferred to do so;

That this procedure was approved by affiant solely for the benefit of the clerks concerned and without any intention of inducing the clerks to apply for reclassification to Grade 4;

That the records of the Post Office Department show that a number of transfers and reassignments of Grade 5 terminal clerks were made under this plan during the fifteen months following the enactment of the Terminal Reclassification Act, but that the great majority of the transfers and reassignments were made after October 1, 1935, when the so-called forty-hour week law (39 U. S. C. 832) went into effect, creating several hundred vacancies in the Railway Mail Service;

That on February 14, 1938, five terminal railway post office clerks claiming that they had not applied for reclassification to Grade 4 in order to remain in the terminals, but were arbitrarily reduced to that grade contrary to the provisions of 39 U. S. Code 618a, applied to the United States District Court for the District of Columbia to compel affiant to restore them to Grade 5;

That this was the first notice which affiant had that any terminal railway post office clerks were dissatisfied with the methods followed by affiant's subordinates in reassigning them to Grade 4;

That such suits resulted in judgments in favor of the plaintiffs entered on February 7, 1939;

That immediately after such decision by this Court consideration was given to the question of extending the same relief to other clerks who might be in similar situations, without necessitating the filing of suits by them, with a view to the best interests of the Postal Service and the morale of its employees;

26 | That this matter was under consideration at the time the present action was filed;

That as a result of such consideration it has been decided that each of the plaintiffs in the present action, with the exceptions named in the amended answer, who furnishes the Department within a reasonable time hereafter a statement under oath to the effect that he or she did not freely and without compulsion elect to remain in the terminal at Grade 4 rather than be transferred to a Grade 5 vacancy out of the terminal, will be restored to Grade 5 with the same force and effect as if he or she had never been reclassified in Grade 4, with the exception that such restoration will not be intended or considered to constitute a waiver of any defense which the United States would otherwise have as to any claim for compensation in addition to that which the plaintiffs will have received for services performed by them prior to the beginning of the quarter in which such restoration is made; and

such plaintiff will be transferred to a Grade 5 position out of the terminal as soon as a vacancy arises;

That appropriate departmental instructions have been given to carry this decision into effect;

And that affiant further saith not.

(Signed) JAMES A. FARLEY.

Subscribed and sworn to before me, a Notary Public in and for the City and District aforesaid, this 9th day of June, 1939.

[SEAL]

RALPH B. MANHERZ,

Notary Public.

My commission expires August 10, 1939.

27

CALENDAR No. 1237

73d Congress, 2d Session

Senate Report No. 1162

TO RECLASSIFY TERMINAL RAILWAY POST OFFICES

May 10 (calendar day, May 24), 1934.—Ordered to be printed. Mr. McKellar, from the Committee on Post Offices and Post Roads, submitted the following report. [To accompany H. R. 9392.]

The Committee on Post Offices and Post Roads of the Senate, to whom was referred the bill (H. R. 9392) to reclassify terminal railway post offices, respectfully report the same back to the Senate with the recommendation that the bill do pass.

The committee adopts the report of the Committee on the Post Office and Post Roads of the House of Representatives, as a part of their report, which is as follows:

[H. Rept. No. 1430, 73d Cong., 2d sess.]

The Committee on the Post Office and Post Roads, having had under consideration the bill (H. R. 9392) to reclassify terminal railway post offices, report the same back to the House with the following amendments:

At the end of line 4 and the beginning of line 5, on page 1, strike out the words "all transit".

In line 6, on page 1, after the word "lines" insert "or post offices".

So amended, the committee recommend that the bill do pass.

Representatives of the Post Office Department appearing before the committee in connection with this proposed legislation expressed their approval of the bill as amended.

PROVISIONS OF THE BILL

The bill (H. R. 9392) establishes the terminal railway post-office system and defines its functions.

The clerks assigned to these terminal railway post offices are classified as railway postal clerks and will progress successively to grade 4. (These clerks now progress under present law to grade 5.) This bill would eventually limit the successive promotions to grade 4, thereby reducing the cost of operation in the future, without reducing the clerks now assigned to these terminal railway post offices in rank or salary; those now in grade 5 will be transferred to grade 5 positions in road service, as vacancies occur, and replacements in the terminals will limit advancement to grade 4.

The effect upon clerks in charge is the same as present law.

The bill provides that when a terminal railway post office is operated in three tours there shall be a relief clerk in charge. This provides for a uniform number of clerks in charge in all terminals where conditions are similar. The relief clerk in charge relieves the other three clerks in charge $1\frac{1}{2}$ days per week and receives the same salary as the clerk in charge whom he relieves.

The bill also provides that the clerk in charge of terminals having 75 or more employees shall be of grade 7. There are at present 14 such terminals, and there will therefore be 14 grade 7 clerks in charge.

The bill further provides that no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this measure.

Salaries of railway postal clerks are as follows:

“39 UNITED STATES CODE, SECTION 610

“Railway postal clerks shall be divided into two classes, class A and class B, and into seven grades with annual salaries as follows: Grade 1, salary \$1,900; grade 2, salary \$2,000; grade 3, salary \$2,150; grade 4, salary \$2,300; grade 5, salary \$2,450; grade 6, salary \$2,600; grade 7, salary \$2,700.”

A comparison of the bill with existing law is shown below:

“PRESENT LAW (39 U. S. C. 618)

“Terminal railway post offices shall be divided into two classes, class A and class B; those having less than twenty employees shall be assigned to class A, and those having twenty or more employees shall be assigned to class B. Clerks in class A terminals shall be promoted successively to grade 4, and clerks in charge of tours to grade 5. Clerks in class B terminals shall be promoted successively to grade 5, and clerks in charge of tours to grade 6.”

“PROPOSED LEGISLATION (H. R. 9392)

(Committee amendments shown inside of black brackets; deleted matter in stricken-through type; new matter in italics)

“The terminal railway post office system shall be maintained for the purpose of handling and distributing *all transit* mail not handled or distributed in railway post office lines [or post offices], and the clerks in said terminal railway post offices shall be classified as railway postal clerks and progress successively to grade 4. Clerks in charge of terminals, tours, or crews consisting of less than twenty employees shall be of grade 5. Clerks in charge of terminals, tours, or crews consisting of twenty or more employees shall be of grade 6. When a terminal railway post office is operated in three tours there shall be a relief clerk in charge: Provided, That the clerk in charge of terminals having seventy-five or more employees shall be of grade 7: Provided further, That no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this Act.”

Terminal railway post offices were first established because of the great savings which could be effected by them in the pay of railway-post-office cars. At the beginning the terminals, which were sometimes called “blue-tag stations”, were designed for the distribution only of certain classes of periodicals of secondary importance which took up considerable space in mail cars and interfered with the distribution of first-class mail and newspapers. Soon after the Parcel Post System went into effect on January 1, 1913, these terminals admirably met the problem which this new and bulky class of mail presented, and were consequently expanded to provide distributing units for parcel post as well as other mail. Later on, as fast as the need for them developed, new terminals were set up at strategic points.

At the beginning the terminals were manned by clerks transferred from road service. Now the road service is manned by clerks transferred from the termi-

nals. The terminals have become the training ground for the road. Almost every substitute appointed to a regular position must pass through the terminal before he acquires sufficient seniority to get an assignment on the road.

The terminal clerk and terminal railway post offices are an important part of the Railway Mail Service. In fact, according to the policy and statements of the Department, the terminal clerk is regarded as a railway postal clerk in every sense. The same entrance examination is required of him as of the road clerk. After being certified, no differential in study requirements and

29 examinations is recognized between the substitute clerk assigned to the terminal or the substitute assigned to road duty. All of his training is for the purpose of fitting him to enter the road service in due course of time. Even after his appointment as a regular employee and assignment to a terminal railway post office, the Department still requires of him such study, preparation, and examinations as may be needed by his assignment in the terminal, but also such as may be necessary to make it possible to assign him to road duty eventually. He is subject at all times to emergency assignments in the road service, which are sometimes of considerable duration. He is expected to be prepared for such work. He must be prepared to enter the road service. These terminal clerks are trained so that such personnel is interchangeable with the personnel assigned to the trains, and constant transfers are being made.

The following information has been furnished by the Post Office Department as to the number of clerks below grade 5 in class B terminal railway post offices:

STATEMENT SHOWING CLERKS BELOW GRADE 5 IN CLASS B TERMINAL RAILWAY POST OFFICES AS OF APR. 26, 1934

Terminal	Grades				Total
	4	3	2	1	
Portland					0
Springfield	5	6			11
Boston	11	10	1	1	23
Pennsylvania	36	50	42	15	143
Grand Central	6	19	21	11	57
Albany					0
Binghamton					0
Broad Street, Philadelphia	5	5	1		11
Buffalo	21	6		1	28
Camden	3	4			7
Central (Jersey City)	3	5	1	2	11
Erie (Jersey City)	2	6			8
Hoboken	5	6	1	1	13
Harrisburg	7	2			9
Philadelphia	7	6	5		18
Reading	12	8			20
Utica					0
Washington, D. C.	11	1			12
Jacksonville	3	4	1		8
Birmingham	1				1
Nashville	5				5
Atlanta	15	12			27
Cincinnati	5	5	1		11
Chicago	35	46	23	19	123
St. Louis	2				2
Kansas City	9	3			12
Ogden	4	2	1	1	8
Los Angeles	8	1	2	1	12
Cleveland	9	6			15
Detroit	11	4			15
Milwaukee	5	3	1		9
St. Paul	15	11	1		27
Sioux City					0
Little Rock					0
Texarkana					0
Fort Worth					0
Memphis	2	2			4
Spokane	2	2			4
Council Bluffs	3	1			4
Denver	3		1		4
Omaha					0
Pittsburgh	27	47	13		87
Total	298	283	116	52	749

30 The proposed legislation is the result of recommendations made by the Post Office Department for a reclassification of the terminal railway post offices. The Department's original proposal was as embodied in H. R. 8934. The measure was modified by the committee and the amended bill reintroduced and numbered H. R. 9392. The Post Office Department has suggested the amendments to H. R. 9392 offered by the committee in this report, believing they will accomplish substantially the same result in 3 years as was contemplated in their original proposal, without reducing in rank or salary any of the present employees.

Mr. J. M. Donaldson, Assistant to the Second Assistant Postmaster General, favors and recommends the passage of this bill, which also has the approval of the Postmaster General.

31 *Affidavit of John D. Hardy, General Superintendent of the
Railway Mail Service*

Filed June 13, 1939

* * * * *

CITY OF WASHINGTON,

District of Columbia, ss.

John D. Hardy, being first duly sworn, says:

That since May 1, 1939, affiant has been General Superintendent of the Railway Mail Service of the Post Office Department, located at Washington, D. C., and that he has charge of the personnel records of each employee in the Railway Mail Service throughout the United States, including railway postal clerks assigned to railway post office terminals.

Affiant further says that the personnel records of the Railway Mail Service show that the following-named clerks were reclassified to Grade 4 on the dates indicated; were separated from the service on the dates indicated, the cause of such separation being shown in each case:

Name	Reclassified to grade 4	Separated eff.	Cause of separation
Urbane S. Carney	11- 1-35	2-17-38	Retired.
James M. French	6-16-35	12-14-37	Removed for misconduct.
Walter D. Hubley	10- 1-35	1-31-38	Retired.
T. Emory Myers	10- 1-37	1-31-39	Resigned.
Farragut Owens	12- 1-34	3-31-38	Retired.
Ernest L. Stowe	12-16-35	10-31-38	Retired.

Affiant further says that the personnel records of the Railway Mail Service show that Frank W. Joesten was at no time arbitrarily reduced to Grade 4, but that on the contrary the said clerk was transferred, effective August 1, 1935, to a Grade 5 position where he remained until he was reassigned at his own request on September 13, 1937, to a Grade 4 position in a terminal, in which position he remained until the date of his retirement on October 31, 1938.

Affiant further states that said personnel records show that the clerks listed below, formerly assigned to railway post office terminals at Grade 5, are now occupying Grade 5 positions in organizations of the Railway Mail Service, the effective dates of their reclassification to Grade 4 and the effective dates of their reclassification to Grade 5 being shown:

32	Name	Grade 4	Grade 5
	Raymond Apple	10- 1-35	6- 1-39
	Alpheus E. Baker	10- 1-35	3- 1-39
	David G. Barnes	10- 1-35	4- 1-36
	Oliver M. Bradshaw	10- 1-35	6- 1-37
	John H. Brown	10-16-35	6- 1-39
	Clarence J. Burley	12-16-35	12- 1-38
	James M. Clayton	10- 1-35	4- 1-39
	William F. Cole	10- 1-35	1-18-38
	Roy W. Cudmore	5-16-35	9- 1-38
	De L. M. Cupp	6-16-35	10- 1-35
	Clement H. Davenport	3-16-35	4- 1-38
	Joseph R. Finney	5-16-35	6- 1-39
	David Galane	4-16-35	12-10-35
	Clarence W. Garland	10- 1-35	11- 8-38
	Samuel H. Hadley	3- 1-35	9- 1-38
	Murdock Hall	5-16-35	9- 8-36
	James A. Holt	10- 1-35	12- 7-38
	Otto C. Huffman	6-16-35	7- 1-38
	Francis H. Johnston	10- 1-35	6- 1-39
	William H. Kannmann	10-16-35	6- 1-39
	George H. Keenan	10-16-35	9- 9-38
	Archie L. Kendall	10-16-35	2- 2-38
	Ernest L. Kief	10- 1-35	11- 1-37
	Ole B. Kilen	3- 1-36	5-18-38
	Lloyd A. Kinyon	10- 1-35	11- 1-38
	Harold A. Lewis	12- 1-35	1- 1-39
	Walter C. Lowman	10- 1-35	5- 1-37
	Lester F. Pike	10- 1-35	6- 1-39
	Nicholas A. Plenchner	3- 1-36	5- 3-39
	Edward A. Point	3-16-35	6- 1-39
	Leland S. Rackliffe	10-16-35	10- 1-38
	Lester Radlow	11- 1-35	6- 1-39
	John E. Reuss	10- 1-35	4- 4-38
	Charles R. Rose	10-16-35	4- 1-39
	Melvin L. Soren	10-16-35	12- 1-38
	Leslie R. Talbott	8- 1-35	12- 1-38
	Jervis N. Tittensor	11- 1-35	8- 2-37
	James A. Washington	7- 1-35	4- 1-39
	Elias W. T. Whitlock	7- 1-35	4- 1-39
	Irving E. Willett	10- 1-35	5- 1-38
	John Zeigler	4- 1-35	10- 1-38

Affiant further states that said personnel records show that the following named clerks are now in Grade 6 positions in the Railway Mail Service, the dates of their original reclassification and the dates of their reclassification to Grade 5 being shown:

Name	Grade 4	Grade 5
John A. Carson	10- 1-35	11-1-37
Charles R. Rose	10-16-35	4-1-39
Anthony Haase, Jr.	11- 1-35	4-1-39

Affiant further states that the personnel records of the Railway Mail Service clearly show that the following named clerks were at no time arbitrarily reduced to Grade 4, but that on the contrary, the said clerks were transferred out of the terminals and were

later transferred back at Grade 4 to the same or other terminals at their own voluntary requests:

33	Name	Eff. date of transfer out	Eff. date of transfer back
	Charles E. Bell	11-1-35	3-1-36
	Edward M. Bryner	10-1-35	1-1-36
	Oscar Hartman	11-1-35	12-1-35
	Thomas F. Herlihy	10-1-35	2-1-36
	Henry M. Igou	6-1-35	9-1-35
	Errol C. Jump	10-1-35	12-1-35
	Joseph W. Kreiner	10-1-35	12-1-35
	Fred L. McChesney	10-1-35	11-1-35
	William T. Oliver, 3rd	5-1-35	8-1-35
	Osmer C. Rose	11-1-35	12-1-35
	Frank L. Simpson	10-1-35	11-1-35
	Edward G. Stringer	3-1-38	4-1-38
	Leslie R. Talbott	7-1-35	8-1-35
	Clive J. York	10-1-35	11-1-35
	Dechland V. Young	10-1-35	6-1-36

Affiant further states that the personnel records of the Railway Mail Service show that the following-named clerks were ordered transferred to Grade 5 positions out of the terminals and, upon the clerks' requests for reclassification to Grade 4 in order to remain in the terminals, such transfers were revoked and the clerks were reclassified accordingly, the dates of such transfers and the date of the revocation of such transfers being shown:

Name	Transfer arranged	Date of revocation
Oliver M. Bradshaw	9-11-35	9-23-35
Robert E. Goldman	10-24-35	11-13-35
George A. Kalmbacher	10-24-35	11- 9-35
Frederic M. Metzger	9-23-35	9-30-35
Ralph Woodruff	11-27-35	12-23-35

Affiant further says that the personnel records of the Railway Mail Service show that the following-named clerks were applicants for transfers to Grade 5 positions out of the terminals, but when recommended for transfer, and before orders could be entered effecting their transfers, they voluntarily withdrew their applications and requested to be permitted to remain in the terminals at Grade 4. Of these clerks, Ernest L. Stowe was retired from the service effective October 31, 1938:

John H. Bowman.
Arthur A. Lane.
Thomas E. Leach.

Alfred S. Morgan.
Buren Roberts.
Ernest L. Stowe.

Affiant further says that the personnel records of the Railway Mail Service show that Lewis H. Young was reduced from Grade 5 in the Washington Terminal RPO to Grade 4 in that terminal for disciplinary reasons effective 9-1-34, and that said clerk's reduction was in no way connected with the terminal reclassification Act of June 14, 1934; and Henry Blumenfeld, after being reduced

to remain in the terminal when his name was reached for transfer November 1, 1935, remained in the terminal at Grade 4 until November 1, 1938, when he had to be reduced and reassigned as a laborer for insubordination, which position he now holds.

34 Affiant further says that the personnel records of the Railway Mail Service show that Alfred S. Morgan was, upon his own request on account of his ill health, reduced, effective July 1, 1936, to the position of nondistributor at Grade 3, which position and grade he has occupied since that date, and now occupies;

And further affiant saith not.

JOHN D. HARDY,
*General Superintendent of the
Railway Mail Service.*

Subscribed and sworn to before me, a Notary Public in and for the City and District aforesaid, this 23d day of May, 1939.

[SEAL]

LAFAYETTE G. BUEBLER,
Notary Public.

My commission expires Feb. 15, 1941.

35 *Affidavit of Charles A. Deitz, Chief of Personnel of the
Railway Mail Service of the Post Office Department*

Filed June 13, 1939

* * * * *

CITY OF WASHINGTON,

District of Columbia, ss.

Charles A. Deitz, being first duly sworn, from personal knowledge says:

That he is now and has been since November 1, 1918, Chief of Personnel of the Railway Mail Service of the Post Office Department;

Part I

That as such officer it was his duty to review the recommendations of the division superintendents of the Railway Mail Service with respect to the reclassification of terminals under the Act of June 14, 1934 (39 U. S. C., Sec. 618a), and that on June 16, 1934, a circular letter, a true and accurate copy of which is appended hereto as a part hereof, was forwarded to such division superintendents for their instruction and guidance;

That pursuant to their instructions the division superintendents from time to time forwarded to the office of the General Superintendent, to which affiant is attached, their recommendations as to transfers and reclassifications under such circular letter;

That when such recommendations were received, they were

first reviewed by affiant and upon his approval of them they were submitted to the General Superintendent for his signature and after being signed by him were then presented to the Second Assistant Postmaster General for his signature, after which they became effective;

That in no case were such recommendations submitted to the Postmaster General and in no case were such decisions appealed for his decision pursuant to Section 10 of the Postal Laws and Regulations, 1932; although such appeals could have been taken;

That after such reclassifications were made any such reclassified clerk could have applied for restoration to Grade 5, and upon denial of such application, could have taken an appeal to the Postmaster General from such decision under said section;

That in each case in which affiant approved the recommendation of the particular division superintendent that a clerk be reclassified to Grade 4, in lieu of transfer from a terminal, such approval was made by him upon the understanding and belief that such clerks preferred to remain in the terminal at Grade 4 to a transfer to another office at Grade 5, and that affiant had no reason to, nor did he, suspect in any case that any improper influence whatsoever had been employed to induce the clerk's decision;

That upon the decision of the District Court of the United States for the District of Columbia in the case of *U. S. ex rel. Ricci et al. v. Farley*, Law Nos. 89858-89862, inclusive, consideration was given to the question of extending the same relief to other clerks who might be in similar situations, without necessitating the filing of suits by them, with a view to the best interests of the Postal Service and the morale of its employees and that while such consideration was in progress the present suit was filed;

That the allegations contained in paragraph 5 of the complaint, as follows:

"During the time that said prior suits were pending plaintiffs herein understood, and were led to believe, that said actions would be treated and regarded by the proper officials of the Post Office Department, as test suits or class actions, and that the defendant, through his proper subordinate officers, would, after the decisions of this Honorable Court in those cases, apply to these plaintiffs the rulings or decisions of the Court in those cases. The defendant has failed to do this and has, through certain of his subordinate officers, informed these plaintiffs that they must institute litigation in order to be restored to their proper grade and salary classification."

are not true in so far as affiant is personally concerned and he is advised by all other persons in the Department likely to have had anything to do with the matter that none of the alleged representations were made by them at any time;

Part II

That on July 1, 1934, there were 2,174 clerks classified in Grade 5 and assigned to former Class B terminal railway post offices (39 U. S. C., Sec. 618);

That of that number 1,232 clerks were transferred out of the terminals to Grade 5 positions in the Railway Mail Service or were otherwise disposed of by retirement, etc.;

That the remaining 942 clerks were reclassified to Grade 4 and permitted to remain in their terminals;

37 That as a result of the decision of the United States Court of Appeals for the District of Columbia in the case of *Welsh v. Farley* (92 Fed. 2d, 533), on August 2, 1937, 300 clerks assigned to terminals who had been previously considered Grade 4 clerks were determined to have been entitled to classification at Grade 5 and were accordingly so classified;

That of such number 134 clerks were transferred to Grade 5 positions out of the terminals or were otherwise disposed of, and 166 clerks were reclassified to Grade 4 in accordance with the procedure aforesaid, and permitted to remain in the terminals;

That after the decision of the District Court of the United States for the District of Columbia in the above *Ricci* cases mentioned, the five plaintiffs in those suits were reclassified to Grade 5 and transferred to Grade 5 positions out of the terminals;

That the following table was prepared from the official personnel records of the Railway Mail Service, in affiant's custody and under his supervision, and correctly shows the facts contained in said records;

That column 1 of said table shows the month and year followed by the names of plaintiffs reclassified from Grade 5 to Grade 4 during each such month;

That column 2 of said table shows the total number of plaintiffs reclassified during the month shown in column 1;

That column 3 of said table lists the vacancies to which the plaintiffs could have been transferred from the terminals at Grade 5, but which were actually filled by transferring Grade 4 clerks from the terminals and from Class A offices in the Railway Mail Service, who could not otherwise have received a Grade 5 status, and by the promotion of substitutes who could not otherwise have been promoted; that the vacancies listed in column 3 are listed only once and were filled in the months which appear in column 1, although many of them were actually available in prior months;

That column 4 of said table is hypothetical and shows the number of plaintiffs listed in column 2 who could not have been transferred to the vacancies listed in column 3 until subsequent months;

That column 5 is a cumulative column showing the total of the vacancies listed in column 3 as of the month which appears in column 1;

That column 6 shows the total number of Grade 5 clerks (including the plaintiffs) in the terminals as of July 1934 (who were reclassified to Grade 4 and permitted to remain in the terminals), as hypothetically diminished in subsequent months by the total number of vacancies listed in column 5 to which they could have been transferred at Grade 5.

38	COLUMN #1	COLUMN #2	COLUMN #3	COLUMN #4	COLUMN #5	COLUMN #6
	Month and year followed by names of plaintiffs reclassified	Number of plaintiffs (reclassified) during month	Number of vacancies above grade 4 to which the plaintiffs could be transferred and which had to be filled by grade 4 clerks or substitutes	Number of E plaintiffs in excess of vacancies and carried over to the following month	Total number of vacancies (cumulative)	Total number of grade 5 clerks reclassified in terminals (including plaintiffs) diminished by vacancies available each month
	July, 1934	0	0	0	0	942
	August, 1934	1	1	0	1	941
	Alfred S. Morgan.					
	September, 1934	1	1	0	2	940
	Lewis H. Young.					
	October, 1934	0	3	0	5	937
	November, 1934	0	2	0	7	935
	December, 1934	2	2	0	9	933
	Farragut Owens.					
	Ralph Wickham.					
	January, 1935	0	2	0	11	931
	February, 1935	0	1	0	12	930
	March, 1935	7	2	5	14	928
	Samuel H. Hadley.					
	Gordon H. Hodgson.					
	George H. Yale.					
	Clement H. Davenport.					
	Edward H. Donnelly.					
	Edward A. Point.					
	Samuel Sorin.					
	April, 1935	7	2	10	16	926
	Elmer A. Brooks, Jr.					
	John T. Chandler.					
	Claude T. Crottsenburg.					
	George S. Milliken.					
	John Ziegler.					
	Edward G. Alpaugh.					
	David Galane.					
	May, 1935	6	1	15	17	925
	Charles S. Birely.					
	Roy W. Cudmore.					
	Joseph R. Finney.					
	Murdoch Hall.					
	Lee A. Purdy.					
	Thomas E. Scott.					
	June, 1935	6	4	17	21	921
	De L. M. Cupp.					
	John B. Daniels.					
	James M. French.					
	Otto C. Huffman.					
	Ruben C. Krueger.					
	William L. Marshall.					
	July, 1935	4	6	15	27	915
	Lewis E. Atkinson.					
	Bernard G. Cotman.					
	James A. Washington.					
	Elias W. T. Whitlock					
	August, 1935	2	6	11	33	909
	William T. Oliver, 3d. ¹					
	Leslie R. Talbott. ¹					
	September, 1935	1	6	6	39	903
	Henry M. Igou.					

Footnotes at end of table.

COLUMN #1	COLUMN #2	COLUMN #3	COLUMN #4	COLUMN #5	COLUMN #6
Month and year followed by names of plaintiffs reclassified	Number of plaintiffs (reclassified) during month	Number of vacancies above grade 4 to which the plaintiffs could be transferred and which had to be filled by grade 4 clerks or substitutes	Number of plaintiffs in excess of vacancies and carried over to the following month	Total number of vacancies (cumulative)	Total number of grade 5 clerks reclassified in terminals (including plaintiffs) diminished by vacancies available each month
October, 1935. Edwin H. Abbetmeier. Joseph W. Allen. Ward W. Andrews. 39 Raymond Apple. Edward K. Arvidson. Alpheus E. Baker. David G. Barnes. Edmund H. C. Biedenkapp. Frank G. Biggerstaff. Joseph O. Bovaird. John H. Bowman. Oliver M. Bradshaw. Jordan H. Brantley. John P. Byron. Henry P. Canfield. Huey Cannon. Walter M. Cantrell. John A. Carson. James M. Clayton. William F. Cole. John J. Cox. Clifford O. Darby. James C. Davis. Olga Davis. Charles J. Dezort. Harold C. Doerr. Ernest F. Druilhet. Michael Fels. John Fetchiet. Thomas D. Foil, Jr. Walter T. Frazier. Clarence W. Garland. Louis Habel. Clyde C. Hammers. John W. Heran. William L. Hibbs. Wiley Hitchcock. James A. Holt. George L. Hoyer. Walter D. Hubley. James M. Hughes. Joseph W. Jackson. Clarence S. Johnson. Francis H. Johnston. William H. Kettering. Ernest L. Kief. Lloyd A. Kinyon. Arthur A. Lane. Thomas E. Leach. Aubrey G. Lockhart. Walter C. Lowman. Peter J. Lynch. Ernest C. McCullough. Daniel E. Meadows. Louis H. Meyer. Charles D. Melloy. Frederic M. Metzger. James R. Miles. Clifford H. Miller. William A. Miller. Thomas B. Mulligan. Hiram E. Parker. John M. Parks. Cornelius Pericht. Lester E. Pike. Jesse D. Pollock. Richard H. Quicke. John E. Reuss.	133	292	0	331	611

COLUMN #1	COLUMN #2	COLUMN #3	COLUMN #4	COLUMN #5	COLUMN #6
Month and year followed by names of plaintiffs reclassified	Number of plaintiffs (reclassified) during month	Number of vacancies above grade 4 to which the plaintiffs could be transferred and which had to be filled by grade 4 clerks or substitutes	Number of plaintiffs in excess of vacancies and carried over to the following month	Total number of vacancies (cumulative)	Total number of grade 5 clerks reclassified in terminals (including plaintiffs) diminished by vacancies available each month
October, 1935—Contd. 40 Buren Roberts. Elmer F. Rowe. Allen L. Rutherford. Grover Schroeder. Joseph A. See. Rufus W. Seymour. Joseph W. Skiles. Lawrence O. Small. Allen R. Smith. Ray Smith. Irby Sorrells. Kenneth J. Stokes. John Q. Stuart. William L. Sutton. Joseph B. Volmer. Forest Ward. William F. Watkins. John Weiskittel. Irving E. Willett. Miles D. Williamson. Theodore E. Wolfe. Frank A. Abel. Morris Bachman. Mr. Doris Blois. Jinx E. Brown. John H. Brown. William Butterworth. Martin J. Byrne. Elton A. Cleaver. Alexander Cohen. Samuel D'Aiello. Douglas H. DesVerney. Edna G. Drayton. Ernest Edwards. Louis A. Fedje. Charles L. Flood. Charlotte S. Gatewood. J. Leland Gilliland. Robert E. Goldman. Leonidas H. Hall, Jr. Jacob I. Jacobson. Theodore Johnson. William H. Kammann. George H. Keenan. Thomas Kelly. Archie L. Kendall. William A. Kinckle. Henry L. Lober. Adam J. Michalski. Kate I. Nugent. Joseph P. O'Brien. Anthony Olivet. Robert F. J. Patton. Leland S. Rackliffe. Owen A. Regan. Charles R. Rose. John M. Sands. Julius Schweitzer. George A. Sharrett. William H. Signor, Jr. Fred N. Slaughter. Melvin L. Soren. Thomas E. Stanton. Marie M. Then. Valentine Yagle. 41 November, 1935. Samuel Bischan. Edward J. Bletzer. Henry Blumenfeld. Horace E. Boyd. Julius A. Bryant. William F. Campbell.	39	51	0	382	560

COLUMN #1	COLUMN #2	COLUMN #3	COLUMN #4	COLUMN #5	COLUMN #6
Month and year followed by names of plaintiffs reclassified	Number of plaintiffs (reclassified) during month	Number of vacancies above grade 4 to which the plaintiffs could be transferred and which had to be filled by grade 4 clerks or substitutes	Number of plaintiffs in excess of vacancies and carried over to the following month	Total number of vacancies (cumulative)	Total number of grade 5 clerks reclassified in terminals (including plaintiffs) diminished by vacancies available each month
November, 1935—Contd. Urbane S. Carney. George Cmar. Martin Davis. Cuthbert C. Deane. George E. Deniton. Thomas W. Dixon. Anna M. Doacher. Dennis S. Farrell. Albert Glasser. Anthony Haase, Jr. Charles Haller. William H. Hauer. Joseph H. Johnson. George J. Kafader. George A. Kalmbacher. Joseph Keelsch. George W. Krahe. Charles A. Langston. Fred L. McChesney. ¹ Harry T. Phelps. Lena M. Printz. Lester Radlow. James J. Reilly. John Salvato. Ferdinand H. Scheiner. Harry Schlanger. Joseph F. Schmierer. Frank L. Simpson. ¹ Dorothy M. Brussow (now Dorothy M. Stevenson). Robert Stevenson. John Timmes. Jervis N. Tittensor. Clive J. York. ¹					
December, 1935 Robert M. Ferguson. Oscar Hartman. ¹ Errol C. Jump. ¹ Joseph W. Kreiner. ¹ Harold A. Lewis. Frank E. Lydon. Samuel L. Regenbogen. Osimer C. Rose. ¹ Andrew Stauffacher. Ralph Woodruff. Roy M. Ames. John R. Baer. Clarence J. Burley. John E. Garrity. William R. Grim. Herbert Kyckelhahn. Leslie M. Moore. Fern B. Orrell. Ernest E. Powell. Albert F. Rezabek. 42 Edith D. Rivero. Ernest L. Stowe. Harold B. Stowe. William W. Walker. Hugh L. Wilcox.	25	51	0	433	509
January, 1936 Edward M. Bryner. ¹	1	60	0	493	449
February, 1936 Thomas F. Herlihy. ¹	1	65	0	558	384
March, 1936 Charles E. Bell. ¹ Ole B. Kilen. Frank C. Minar. John F. Munger. Nicholas A. Plenchner. Joseph A. Tax.	6	60	0	618	324

Footnotes at end of table.

COLUMN #1	COLUMN #2	COLUMN #3	COLUMN #4	COLUMN #5	COLUMN #6
Month and year followed by names of plaintiffs reclassified	Number of plaintiffs (reclassified) during month	Number of vacancies above grade 4 to which the plaintiffs could be transferred and which had to be filled by grade 4 clerks or substitutes	Number of plaintiffs in excess of vacancies and carried over to the following month	Total number of vacancies (cumulative)	Total number of grade 5 clerks reclassified in terminals (including plaintiffs) diminished by vacancies available each month
April, 1936	0	51	0	669	273
May, 1936	0	15	0	714	228
June, 1936	1	48	0	762	180
Dechland V. Young, ¹					
July, 1936	0	35	0	797	145
August, 1936	0	34	0	831	111
September, 1936	0	62	0	893	49
October, 1936	0	71	0	964	
November, 1936	0	35	0	999	
December, 1936	0	54	0	1053	
January, 1937	0	44	0	1097	
February, 1937	0	45	0	1142	
March, 1937	0	63	0	1205	
April, 1937	0	42	0	1247	
May, 1937	0	54	0	1301	
June, 1937	0	42	0	1343	
July, 1937	0	57	0	1400	
August, 1937	2	33	0	1433	166
Charles E. Brassel, ²					
Weston W. Hawkins, ²					
September, 1937	1	2	0	1435	164
Frank W. Joesten,					
October, 1937	1	8	0	1443	156
T. Emory Myers, ²					
November, 1937	0	28	0	1471	128
December, 1937	0	22	0	1493	106
January, 1938	0	10	0	1503	96
February, 1938	4	16	0	1519	80
Horace B. Riley, ²					
Otis J. Stickle, ²					
Stanley A. Jackson, ²					
Ralph W. Pittman, ²					
March, 1938	0	25	0	1544	55
April, 1938	1	57	0	1601	0
Edward G. Stringer, ¹					
May, 1938		55		1656	
June, 1938		40		1696	
July, 1938		37		1733	
August, 1938		34		1767	
September, 1938		53		1820	
October, 1938		29		1849	
November, 1938		46		1895	
December, 1938		41		1936	

¹ Requested reclassification to grade 4 in order to transfer from other assignments to the terminals.

² Recognized as grade 5 clerks under the above mentioned decision of Welch vs. Farley.

43 That if any such Grade 5 clerk, who was reclassified to Grade 4 in a terminal in lieu of transfer, had been restored to Grade 5 in such terminal at any time, he would have been transferred to a Grade 5 position outside the terminal as soon as possible, except in the possible case of his promotion to clerk in charge in the terminal.

Part III

That affiant was first appointed to a position in the Railway Mail Service in the year 1913;

That at the time of such appointment and ever since August 24, 1912, the practice in the Railway Mail Service has been to

permit clerks, in organizations of that service which had been reclassified in such manner that they could not remain in such organizations at their then grade, to elect reclassification to a lower grade, in order to remain in such organizations, if they preferred to do so rather than to transfer to other organizations;

That prior to 1915 terminal railway post offices were classified as A, B, and C;

That the highest annual salary paid to ordinary clerks in such terminals was \$1,200, \$1,300, and \$1,500, respectively;

That in the year 1915 all terminals were reclassified by the Postmaster General as Class A terminals; that in carrying such reclassifications into effect the General Superintendent of the Railway Mail Service issued his order of March 27, 1915; that said order is a part of the official records in the custody of affiant; that a true and accurate copy of said order is appended hereto as a part hereof;

That since February 28, 1925, and until the Terminal Reclassification Act of June 14, 1934, all of the railway post offices, transfer offices, and terminal railway post offices were classified as Class A or Class B offices, depending upon the number of clerks assigned thereto (39 U. S. C., 617, 618, and 619);

That in Class A offices of each of these organizations clerks were given periodic automatic promotion no higher than present Grade 4 and in Class B offices to present Grade 5, after service of the requisite periods prescribed by statute (39 U. S. C. 611);

That when by reason of changes in the requirements of the service any such Class B offices became reclassified as Class A offices, the Grade 5 clerks were permitted to elect reclassification to Grade 4, in order to remain in such offices, if they preferred to do so rather than transfer to other Class B offices;

That in cases in which Grade 5 clerks in Class B offices desired to transfer from Class B offices to Class A offices, they were reclassified to Grade 4, upon their request, and so transferred.

44 And further affiant saith not.

CHARLES A. DEITZ,
*Chief of Personnel of the Railway Mail Service
of the Post Office Department.*

Subscribed and sworn to before me, a Notary Public in and for the City and District aforesaid, this 13 day of June, 1939.

[SEAL]

CHARLES E. WARREN,
Notary Public.

My commission expires Sept. 16, 1940.

POST OFFICE DEPARTMENT,
DIVISION OF RAILWAY MAIL SERVICE,
SECOND ASSISTANT POSTMASTER GENERAL,
Washington, March 27, 1915.

HCD.

Copy circular letter to all Superintendents.

The SUPERINTENDENT, R. M. S.

The Postmaster General has directed that the classification of all terminal railway post offices be made Class "A." which provides a maximum salary of \$1,200 per annum for clerks, and that the assignment of clerks receiving a higher salary be continued in the terminal as temporary until places can be found for them on the road to which they may be transferred without reduction. When vacancies occur to which they can be assigned, they should be given the choice of transfer to the lines at their present salary or reduction to \$1,200 per annum with assignment to the terminal.

GENERAL SUPERINTENDENT.

46 CAD.BS

POST OFFICE DEPARTMENT,
DIVISION OF RAILWAY MAIL SERVICE,
SECOND ASSISTANT POSTMASTER GENERAL,
Washington, June 16, 1934.

Subject: Terminals—Reclassification of under the Act approved
6-14-34

Circular Letter No. 4050

To all Superintendents, R. M. S.

1. An act, reading as follows, was approved June 14, to reclassify terminal railway post offices:

"That the terminal railway post office system shall be maintained for the purpose of handling and distributing mail not handled or distributed in railway post office lines or post offices, and the clerks in said terminal railway post offices shall be classified as railway postal clerks and progress successively to grade 4. Clerks in charge of terminals, tours, or crews consisting of less than twenty employees shall be of grade 5. Clerks in charge of terminals, tours, or crews consisting of twenty or more employees shall be of grade 6. When a terminal railway post office is operated in three tours there shall be a relief clerk in charge: Provided, That the clerk in charge of terminals having seventy-five or more employees shall be of grade 7: Provided further, That

no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this Act."

2. As this act is effective at once, you should submit Forms 5090 with new organization sheets immediately to reclassify all terminals in accordance with its provisions, effective July 1, and include therewith a statement prepared in duplicate showing the names arranged in order of seniority, the grades, the marital status, the home location and whether rented or owned, and the state apportionment of the employees thereby rendered surplus high grade.

3. It is desired that the clerical force be adjusted as soon as practicable, and the following procedure will govern in disposing of the surplus high grade clerks; that is, clerks receiving pay in excess of the salary authorized by law for their positions:

(a) Whenever a grade 5 vacancy that can be offered to terminal clerks becomes available in the division or on a nearby line in an adjoining division, it will be bulletined in the division terminals for five days, and the senior applicant from the state to which the vacancy belongs will be recommended for transfer.

(b) If no applications are received, the junior grade 5 clerk will be recommended for arbitrary transfer unless he prefers to take reduction to grade 4 to continue in the terminal. Before submitting recommendations of Form 5030 for transfer or reduction, superintendents should ascertain the clerks' wishes in writing.

(c) Clerk in charge vacancies will be bulletined in like manner, if necessary, to place clerks in charge from terminals.

(d) Clerks in terminals desiring any particular lines should keep applications on file, in accordance with paragraph 2, section 12, of the Seniority Rules, as all vacancies developing may not be bulletined in the terminals.

(e) State apportionment will be observed as far as practicable when granting voluntary transfers, but it may become necessary in some instances to arbitrarily transfer junior clerks regardless of apportionment.

S. A. CISLER,
General Superintendent.

47

Memoranda

June 13, 1939. Memorandum of points and authorities in support of defendant's motion for summary judgment—filed and mailed.

June 26, 1939. Memorandum of points and authorities in opposition to defendant's motion for judgment—filed.

48 *Defendant's motion for reconsideration of his motion for judgment, and that the same be granted, or in the alternative for action under Rule 56 (d) of the Rules of Civil Procedure*

Filed June 30, 1939

* * * * * *

The defendant moves the Court for reconsideration of his motion for judgment filed herein on June 13, 1939, and upon such reconsideration, moves that said motion be granted.

The grounds for this motion are as follows:

1. Defendant's motion for judgment, affidavits, and memorandum in support thereof, were filed on June 13, 1939.

2. On June 16, 1939, and again on June 22, 1939, the Court entered orders joining additional parties plaintiff in this action.

3. On June 27, 1939, defendant's counsel received a copy of plaintiffs' memorandum in opposition to said motion, and on the same day received a call from the Clerk advising that if an oral hearing were desired it could not be had until after the summer recess of the Court. Believing that there would be an interval of several days in which a reply memorandum could be filed, counsel consented to the submission of the motion without such hearing. It would appear that the motion was submitted at once.

4. On June 28, 1939, defendant's answer and motion for judgment as to the additional plaintiffs were filed. These papers made the previously filed amended answer and motion for judgment equally applicable to the plaintiffs thereafter joined.

49 On the same day the Court announced that the defendant's motion for judgment would be denied.

5. It is the intention of the present motion to bring to the attention of the Court certain considerations discussed in the memorandum of points and authorities filed herewith, in support hereof, which would have been presented in the above-mentioned reply memorandum but for counsel's misunderstanding as to the amount of time available for that purpose.

In the alternate, pursuant to Rule 56 (d) of the Rules of Civil Procedure, the defendant moves the Court as follows:

1. For an Order ruling upon the following questions:

(a) Whether all the plaintiffs have failed to exhaust their administrative remedy and therefore have no cause of action;

(b) Whether all the plaintiffs are barred by laches, acquiescence, or estoppel from asserting their present claims for relief;

(c) Whether all the plaintiffs (except those named in paragraph 7, subparagraph (d), (e), (f), and (g) of the amended answer) are entitled to recover the relief prayed because, as insisted by the plaintiffs (memorandum, pp. 5-6), the defendant

was without legal power to reclassify them in a lower grade, notwithstanding their consent or acquiescence.

2. For such other action under Rule 56 (d) favorable to the defendant, as to the Court may seem proper.

The purpose of this alternative motion is to eliminate as many questions as possible and to reduce the number of cases as to which trial must be had.

SAM E. WHITAKER,

Assistant Attorney General.

DAVID A. PINE,

E.,

United States Attorney.

W. S. WARD,

Special Assistant to the Attorney General,

HOWARD BOYD,

E.,

Assistant United States Attorney.

ENOCH E. ELLISON,

Attorney, Department of Justice,

Attorneys for the Defendant.

VINCENT M. MILES,

E.,

Solicitor, Post Office Department,

CALVIN W. HASSELL,

E.,

Assistant Solicitor, Post Office Department,

Of Counsel.

51

Memoranda

June 30, 1939. Defendant's memorandum of points and authorities in support of motion for reconsideration of his motion for judgment, &c.—filed.

July 3, 1939. Memorandum in opposition to defendant's motion for judgment as to additional plaintiffs and Memorandum of points and authorities in opposition to defendant's motion for reconsideration of his motion for summary judgment, &c.—filed.

Order denying motion for summary judgment

Filed July 10, 1939

* * * * *

Upon consideration of the motion of the defendant for summary judgment of dismissal, it is, by the Court, this tenth day of July 1939,

Ordered, That said motion be, and the same is hereby denied.

JENNINGS BAILEY,

Justice.

The foregoing order is approved as to form by counsel for the defendant, with the understanding and agreement between counsel for all parties, that the pending motion, entitled "Defendant's Motion for Reconsideration of His Motion for Judgment, and That the Same be Granted, or in the Alternative For Action Under Rule 56 (d) of the Rules of Civil Procedure", and filed herein on June 30, 1939, shall be considered as a motion to vacate this order.

RHODES, KLEPINGER & RHODES,
By COOPER B. RHODES,
Attorneys for Plaintiff.

DAVID A. PINE,
HOWARD BOYD,
Attorneys for Defendant.

Memorandum opinion

Filed July 15, 1939

* * * * *

The motion to rehear the motion of the defendant for summary judgment will be overruled except as to the plaintiff Lewis H. Young. As to him the motion for a summary judgment will be sustained.

BAILEY, J.

Order modifying previous order filed July 10, 1939, etc.

Filed July 15, 1939

* * * * *

Upon consideration of the defendant's motion to reconsider his motion for summary judgment, it is by the Court this 15th day of July 1939:

Ordered, that the previous order filed herein on July 10th, 1939, be and the same is hereby modified to the extent that the defendant's motion for summary judgment of dismissal is granted as to the plaintiff Lewis H. Young and as to him the complaint is dismissed.

JENNINGS BAILEY,
Justice.

53 *Order overruling the defendant's motion for reconsideration of his motion for judgment, etc.*

Filed July 15, 1939

* * * * *

Upon consideration of the motion of the defendant, filed herein on June 30, 1939, for reconsideration of his motion for judgment, it is by the Court this 15th day of July, 1939;

Ordered, that said motion be, and the same is hereby overruled as to all of the plaintiffs except the plaintiff Lewis H. Young.

JENNINGS BAILEY,
Justice.

No objection to form:

DAVID A. PINE,
HOWARD BOYD,
Attorneys for Defendant.

Order denying defendant's motion for judgment as to additional parties

Filed July 15, 1939

* * * * *

Upon consideration of the motion of the defendant, filed herein on June 28, 1939, for judgment of dismissal as to the parties plaintiff who were joined in this action by orders of the Court dated June 16, 1939, and June 22, 1939, it is by the Court this 15th day of July, 1939;

Ordered, that said motion be, and the same is hereby overruled.
JENNINGS BAILEY,
Justice.

No objection to form:

DAVID A. PINE,
HOWARD BOYD,
Attorneys for Defendant.

54

Memorandum

August 2, 1939. Notice of application for special appeal—filed.

Order allowing special appeal

Filed October 25, 1939

United States Court of Appeals for the District of Columbia

No. 3144 Original. October Term, 1939

Civil Action No. 1935

JAMES A. FARLEY, POSTMASTER GENERAL OF THE UNITED STATES,
PETITIONER

vs.

EDWIN H. ABBETMEIER, FRANK A. ABEL, ET AL.

On consideration of the petition for allowance of special appeal from the orders of the District Court of the United States en-

tered on July 10th and 15th, 1939, by Mr. Justice Jennings Bailey,

It is ordered by the Court that the petition be, and it is hereby, granted and special appeal allowed as prayed.

Per Mr. Chief Justice Groner, October 20, 1939.

A true Copy,

Test.

[SEAL]

JOSEPH W. STEWART,

*Clerk of the United States Court of
Appeals for the District of Columbia.*

55 | *Appellant's statement of the points on which he intends to
rely on the appeal*

Filed October 26, 1939

* * * * *

Pursuant to Rule 75 (d) of the Rules of Civil Procedure the appellant states that on the special appeal allowed herein by the United States Court of Appeals for the District of Columbia on October 20, 1939, he intends to contend that the District Court erred in entering its order on July 10, 1939, denying the defendant's motion filed herein on June 13, 1939, for judgment of dismissal as to each of the parties plaintiff then joined in this action, and that it further erred in entering its order on July 15, 1939, overruling the motion of the defendant filed herein on June 28, 1939, for judgment of dismissal as to each of the parties plaintiff who were joined in this action by orders of the Court dated June 16, 1939, and June 22, 1939, and in support of such contentions he intends to rely on each separate part of said motions and upon each separate point, ground and defense mentioned or adopted therein in support thereof, and more particularly, but without waiving others, the following points:

1. The plaintiffs are estopped from prosecuting this action and they are barred from any right to the relief demanded,
56 | by reason of their laches; by reason of their acquiescence in their reclassifications from Grade 5 to Grade 4, of which they complain; by reason of their acceptance of the benefits of such reclassifications; and by reason of their unjustified delay, in asserting their claims, to the prejudice of the United States;

2. The plaintiffs have not exhausted and have not attempted to exhaust the adequate administrative remedies available to them;

3. The case is moot as to all the plaintiffs, with the exception of those named in subparagraphs (d), (e), and (f) of paragraph 7 of the amended answer, because, either, such plaintiffs no longer are employed as Railway Postal Clerks, or they already occupy Grade 5 or Grade 6 positions, or, by verifying their present allegations (as stated in paragraph 6 of the amended answer) they will be restored to Grade 5 by administrative action; and

4. Each of the plaintiffs named in subparagraphs (d), (e), and (f) of paragraph 7 of the amended answer was properly and lawfully reclassified from Grade 5 to Grade 4 upon his own voluntary request;

All as more fully stated and explained in said motions, in the several defenses of the amended answer adopted by reference in such motions, and in the several affidavits filed in support thereof.

FRANCIS M. SHEA,

Assistant Attorney General,

W. S. WARD,

Special Assistant to the Attorney General,

ENOCH E. ELLISON,

Attorney, Department of Justice,

Attorneys for the appellant.

VINCENT M. MILES,

Solicitor, Post Office Department,

CALVIN W. HASSELL,

Assistant Solicitor, Post Office Department,

Of counsel.

57

Appellant's designation of record

Filed October 26, 1939

* * * * *

The United States Court of Appeals for the District of Columbia having, under date of October 20, 1939, granted appellant's petition for special appeal from orders of the District Court of the United States for the District of Columbia in the above-entitled action, the appellant, James A. Farley, Postmaster General of the United States, defendant herein, by his attorneys, requests the Clerk of the District Court of the United States for the District of Columbia to prepare the transcript of record on such appeal, and to include in said transcript the following:

1. Complaint for declaratory judgment and mandatory relief, filed March 6, 1939, in full.

2. Memorandum: The summons to answer was issued and served upon the defendant on March 6, 1939.

3. Notice of voluntary dismissal of complaint as to certain plaintiffs, filed April 25, 1939, in full.

4. Motion for leave to add additional plaintiffs, filed April 25, 1939, in full.

58 5. Memorandum: The memorandum of points and authorities in support of the foregoing motion was served and filed therewith, on April 25, 1939.

6. Notice of voluntary dismissal of complaint as to certain plaintiffs, filed May 5, 1939, in full.

7. Memorandum: The answer of defendant, James A. Farley, Postmaster General, was served and filed on May 5, 1939.

8. Amended answer of defendant James A. Farley, Postmaster General, filed May 25, 1939, in full.
9. Stipulation of dismissal of complaint as to certain plaintiffs, filed May 29, 1939, in full.
10. Motion for leave to add additional plaintiffs, filed May 29, 1939, in full.
11. Memorandum: The memorandum of points and authorities in support of the foregoing motion was served and filed therewith, on May 29, 1939.
12. The defendant's motion for judgment, filed June 13, 1939, in full.
13. Memorandum: The memorandum of points and authorities in support of the foregoing motion was served and filed therewith, on June 13, 1939.
14. Affidavit of James A. Farley, Postmaster General (including Senate Report No. 1162, 73rd Cong., 2nd Sess., appended thereto), filed June 13, 1939, in full.
- 59 15. Affidavit of John D. Hardy, General Superintendent of the Railway Mail Service, filed June 13, 1939, in full.
16. Affidavit of Charles A. Deitz, Chief of Personnel of Railway Mail Service of the Post Office Department (including the copies of circular letters under dates of March 27, 1915, and June 16, 1934, appended thereto), filed June 13, 1939, in full.
17. Order adding parties plaintiff, filed June 16, 1939, in full.
18. Order adding parties plaintiff, filed June 22, 1939, in full.
19. Memorandum: Plaintiffs' memorandum of points and authorities in opposition to defendant's motion for judgment was filed on June 26, 1939.
20. Defendant's answer to the complaint of the additional plaintiffs joined in this action by orders of the court, filed June 28, 1939, in full.
21. Defendant's motion for judgment as to the additional plaintiffs joined in this action by order of court, filed June 28, 1939, in full.
22. Defendant's motion for reconsideration of his motion for judgment, and that the same be granted, or, in the alternative, for action under Rule 56 (d) of the Rules of Civil Procedure, filed June 30, 1939, in full.
- 60 23. Memorandum: The defendant's memorandum of points and authorities in support of the foregoing motion served therewith, was filed on June 30, 1939.
24. Memorandum: The plaintiffs' memorandum in opposition to defendant's motion for judgment as to additional plaintiffs, and memorandum of points and authorities in opposition to defendant's motion for reconsideration of his motion for summary judgment, etc., were filed on July 3, 1939.
25. Order denying motion for summary judgment (including the agreement of counsel appearing at the foot thereof), filed July 10, 1939, in full.

26. Memorandum of Bailey, J., filed July 15, 1939, in full.
27. Order modifying previous order filed July 10th, 1939, denying motion for summary judgment, and dismissing complaint as to plaintiff Lewis H. Young, filed July 15, 1939, in full.
28. Order overruling the defendant's motion for reconsideration of his motion for judgment, etc., filed July 15, 1939, in full.
29. Order denying defendant's motion for judgment as to additional parties, filed July 15, 1939, in full.
30. Memorandum: The defendant's notice of application for special appeal was filed on August 2, 1939.
61 31. Order of the United States Court of Appeals, dated October 20, 1939, granting petition for special appeal, filed October 25, 1939, in full.
32. Appellant's statement of the points on which he intends to rely on the appeal, served and filed with this designation, in full.
33. This designation.

FRANCIS M. SHEA,
Assistant Attorney General,

W. S. WARD,
Special Assistant to the Attorney General,

ENOCH E. ELLISON,
Attorney, Department of Justice,
Attorneys for the appellant.

VINCENT M. MILES,
Solicitor, Post Office Department,

CALVIN W. HASSELL,
Assistant Solicitor, Post Office Department,
Of counsel.

STATEMENT OF SERVICE

A copy of the foregoing designation, together with a copy of appellant's statement of the points on which he intends to rely on the appeal, was mailed to Rhodes, Klepinger and Rhodes, Esquires, Attorneys for plaintiffs, at 314 National Press Building, 1346 F Street NW., Washington, D. C., on October 26, 1939.

ENOCH E. ELLISON,
Attorney for Appellant.

62 *Stipulation*

Filed November 1, 1939

* * * * *

It is hereby stipulated and agreed by and between counsel for the plaintiffs and defendant, as follows:

1. That the parts of the record in these proceedings listed and shown, on Appellant's Designation of Record, filed herein on the

26th day of October 1939, as items numbered 3, 4, 5, 6, 9, 10, 11, 17, 18, 20, and 21, shall be omitted in the preparation of the record for transmission to the United States Court of Appeals for the District of Columbia.

2. That by a notice of voluntary dismissal, filed herein on April 25, 1939, this suit was dismissed as to the following plaintiffs:

Helena Andrews, John H. Andrews, Ethel M. Bidwell, Branty R. Brown, Edward A. Bruns, J. B. Cardwell, Louis DeGrazio, Charles B. Durrah, Peter L. Finnin, Donald B. Foltz, Willis R. Frill, Henry L. Garbarino, Bernard A. Giesler, Charles E. Hails, George L. Hammond, John S. Hanna, J. A. Harris, Robert E. Harrison, Selmer E. Helleland, W. C. Hewitt, Chris Hoechtenbach, George A. R. Horsley, John Housman, J. W. Huckenpaehler, Lawrence V. Kirk, Henry Kuhn, G. W. Leaf, William H. Lockett, Thomas A. McKnight, Mary L. Nicholson, Robert Pauls, C. Pericht, Albert R. Phillips, Rodney Pryor, Charles M. Rowan, Charles B. Robinson, Nathan C. Sansing, Irene Schat, George L. Schauble, Joseph F. Schmierer, Samuel Sorin, Lawrence Spangler, Clifford D. Staller, Hubert C. Stillwell, Leigh H. Straw, Thomas H. Sykes, Daniel F. Toomey, Harry Vriesema, William J. Warnecke, Martin H. Wildhaber, Thorwald Wogelius, Charles Zikes, Dena Zopp.

63 3. That, by a notice of voluntary dismissal, filed herein on May 5, 1939, this suit was dismissed as to the following plaintiffs:

Charles H. Asch, Charles W. Beane, A. Bonin, Nettie P. Brietz, Arthur C. Bruckman, Sylvester M. Caraway, James O. Clark, Walter E. Cossentine, Lloyd S. Couch, James J. Coughlin, Michael Dillon, J. S. Geiger, Vincent A. Hagerty, Ralph F. Curry, Christine Hallgrimson, James F. Hart, E. F. Hein, Cecil M. Hiatt, Hubert M. Hinant, Dorsey A. Hoskins, Ira Hunt, Russel B. McClelland, Charles W. McMellon, W. J. Martens, Colby O. Morgan, James F. Needham, Herbert Odom, H. Howard Peabody, Robert J. Pendergest, Albert F. Prain, Shird Rodabaugh, Clellia I. Rundle, Edward F. Sartor, Frank Scrivani, Guy M. Smith, Lee R. Smith, Joseph Soelberg, William Van Kirk, Charles L. Vineall, J. Clay Walker.

4. That, by a stipulation signed by counsel for the parties hereto, and filed herein on May 29, 1939, this suit was dismissed as to the following plaintiffs:

Luther M. Blan, Hugh J. Breslin, Francis Glynn, James E. Hedger, Joseph L. Kenefick, Helen F. Knox, Herbert A. Lang, Martin J. Byrne, Frank Bertino, Jr., Carl J. Scherrer, Thomas D. McKinney, Philip Munkenbeck, Joseph Pierrie, V. L. Sisk, D. C. Sparks, A. W. Wisczarek, Rupert B. Perry, James J. Reilly, H. D. Stanley.

5. That by order of this Court entered on the 16th day of June 1939, on a motion filed by counsel for the plaintiffs on April 25, 1939, the following persons were added as parties plaintiff in these proceedings:

Edward G. Alpaugh, Roy M. Ames, Alphus E. Baker, David G. Barnes, Oliver M. Bradshaw, Edmund Biedenkapp, Julius A. Bryant, David Galane, Gordon H. Hodgson, James A. Holt, Joseph L. Kenefick, Lloyd A. Kinyon, Harold A. Lewis, Alfred S. Morgan, Hiram E. Parker, Ralph W. Pittman, Samuel L. Regenbogen, Horace B. Riley, R. W. Seymour, Otis J. Stickles, Jervis N. Tittensor, Irving E. Willett.

6. That by order of this Court entered on the 22nd day of June 1939, on a motion filed by counsel for the plaintiffs on May 29, 1939, the following persons were added as parties plaintiff in these proceedings:

Joseph W. Allen, Henry Blumenfeld, John P. Byron, Leonidas H. Hall, Stanley A. Jackson, C. Pericht, Joseph F. Schmierer, Joseph W. Skiles, Samuel Sorin.

7. That on the 28th day of June 1939, the defendant through his counsel, filed herein an answer to the complaint of the additional plaintiffs joined in this action, by which the defendant adopted by reference his amended answer filed May 25, 1939, and made the same equally applicable to said additional parties plaintiff.

8. That on the 28th day of June 1939, the defendant filed a motion for judgment as to the additional parties plaintiff, who were joined in this action by orders of the Court dated June 16, 1939, and June 22, 1939, and the defendant thereby adopted by reference his motion for judgment, filed June 13, 1939, and all papers filed in support thereof, and made the same equally applicable to said additional parties plaintiff.

9. That this stipulation shall be included in the record to be prepared for transmission to the United States Court of Appeals for the District of Columbia.

RHODES, KLEPINGER & RHODES.

By COOPER B. RHODES,

Attorneys for Plaintiffs.

FRANCIS M. SHEA,

Assistant Attorney General,

W. S. WARD,

Special Assistant to the Attorney General,

ENOCH E. ELLISON,

Attorney, Department of Justice,

Attorneys for Defendant (Appellant).

65 District Court of the United States for the District
of Columbia

UNITED STATES OF AMERICA.

District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 64, both inclusive, to be a true and correct transcript of the record, according to designation of record and stipulation of counsel herein filed, copies of which are made part of this transcript, in cause No. 1935, Civil Action, wherein Edwin H. Abbetmeier et al. are Plaintiffs, and James A. Farley, Postmaster General of the United States, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 8th day of November 1939.

[SEAL]

CHARLES E. STEWART,

Clerk.

By CHAS. B. COFLIN,

Assistant Clerk.

[Endorsement on cover:] No. 7546. Farley &c., Appellant, vs. Abbetmeier et al. United States Court of Appeals for the District of Columbia. Filed Nov. 10. 1939. Joseph W. Stewart, Clerk.

FILED JAN 5 - 1940

No. 7546—Special Calendar

Joseph W. Stewart

CLERK

**In the United States Court of Appeals for the
District of Columbia**

OCTOBER TERM, 1939

JAMES A. FARLEY, POSTMASTER GENERAL OF THE UNITED
STATES, APPELLANT

v.

EDWIN H. ABBETMEIER, FRANK A. ABEL, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S BRIEF

FRANCIS M. SHEA,
Assistant Attorney General.

W. S. WARD,

ENOCH E. ELLISON,

Attorneys, Department of Justice.

Attorneys for Appellant.

VINCENT M. MILES,

Solicitor, Post Office Department.

CALVIN W. HASSELL,

Assistant Solicitor, Post Office Department.

Of Counsel.

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In the United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1939

No. 7546—SPECIAL CALENDAR

JAMES A. FARLEY, POSTMASTER GENERAL OF THE UNITED
STATES, APPELLANT

v.

EDWIN H. ABBETMEIER, FRANK A. ABEL, ET AL., APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

This special appeal was allowed by this Court (R. 39-40) from orders of the District Court of the United States, overruling appellant's motion for judgment of dismissal as to each of the appellees.

(a) Jurisdictional statutes

The statutory provision believed to sustain the jurisdiction of this Court is Section 7 of the Act of February 9, 1893, c. 74, 27 Stat. 434; 18 D. C. Code § 26. The appellees (at R. 8) seek to invoke the jurisdiction of the District Court under the provisions of Section 274 (d) of the Judicial Code, as amended, 28 U. S. C. § 400, "and other applicable statutes."

(1)

(b) Chronology of pleadings and proceedings

The various orders of the District Court, with respect to the appellant's motions for judgment, were entered by Mr. Justice Jennings Bailey on July 10 and 15, 1939 (R. 37-39), but the reasons for such decisions were not stated. The pleadings and proceedings were as follows:

1. The complaint (R. 1), naming 332 plaintiffs (R. 1-8), was filed March 6, 1939.

2. On April 25, May 5, and May 29, 1939, voluntary dismissals were entered as to a total of 112 of the original plaintiffs (see R. 44). On April 25 and on May 29, 1939, motions were filed to join a total of 30 additional plaintiffs (see R. 45).

3. The complaint was duly answered (see R. 10), and on May 25, 1939, an amended answer was filed on behalf of appellant (R. 10-15).

4. On June 13, 1939, a motion for judgment (R. 15) and affidavits in support thereof (R. 16-35) were filed on behalf of appellant. Pursuant to Rule 12 (g) of the Rules of Civil Procedure, the motion consisted of three separate parts, as follows:

(a) Request for summary judgment, pursuant to Rule 56 (b);

(b) Request for judgment on the pleadings, pursuant to Rule 12 (c); and

(c) Request for other appropriate action under Rule 56 (d).

The supporting affidavits cover the cases of all the appellees, including those whose motions to join in the action were then pending.

5. On June 16 and 22, 1939, the District Court entered orders joining the additional parties plaintiff to the action, in accordance with their motions filed on April 25 and May 29, 1939, respectively (see R. 45).

6. On June 26, 1939, a memorandum of points and authorities in opposition to the motion for judgment was filed (see R. 35), but no counter-affidavits were filed on behalf of the appellees.

7. On June 28, 1939, an answer and a motion for judgment were filed as to the additional plaintiffs who were joined by the

orders of June 16 and 22, 1939 (see R. 45). These pleadings adopted by reference the existing amended answer (R. 10), and the pending motion for judgment (R. 15), and made them equally applicable to the new plaintiffs. On the same day the District Court announced that the appellant's motion for judgment would be denied (see R. 36).

8. On June 30, 1939, the appellant filed a motion for reconsideration of his motion for judgment (R. 36).

9. On July 10, 1939, in accordance with its announcement of June 28, 1939, the District Court entered its order denying appellant's motion for judgment (R. 37).

10. On July 15, 1939, the Court entered: an order overruling appellant's motion for reconsideration of his motion for judgment, as to all plaintiffs except plaintiff Lewis H. Young (R. 38-39); an order dismissing the complaint as to said Young (R. 38); and an order overruling the motion for judgment filed June 28, 1939, as to the additional plaintiffs (R. 39). The dismissal of plaintiff Young¹ brought the number of plaintiffs, and present appellees, to ~~255~~ ²⁴⁹.

11. Appellant's petition for allowance of special appeal from the orders overruling his motions for judgment (Original No. 3144), was filed August 2, 1939 (see R. 39), and was granted by an order of this Court dated October 20, 1939 (R. 39-40). The transcript of record was filed November 10, 1939 (R. 46).

STATEMENT

A. The nature of the case

This action is prosecuted by ~~255~~ ²⁴⁹ plaintiffs,² who are or were terminal railway postal clerks attached to former class B terminal railway post offices in the United States Railway Mail Service of the Post Office Department (R. 9).

The plaintiffs (at R. 10) demand a judgment commanding the petitioner retroactively to restore them to their former

¹ Apparently the dismissal of the action as to plaintiff Young was based on the facts shown in the affidavits at R. 24.

² ~~We regret that in the petition for allowance of special appeals (p. 2) the total number of plaintiffs was erroneously given as 245 and that similar mistakes were made in stating the numbers of plaintiffs elsewhere in the petition.~~

grade and salary as of and from the dates of their respective alleged reductions in grade and salary, which are claimed to have been made in violation of a *proviso* of the Act of June 14, 1934, c. 522, 48 Stat. 962 (39 U. S. C. § 618a). The pertinent provisions of such Act are as follows:

The terminal railway post office system shall be maintained for the purpose of handling and distributing mail not handled or distributed in railway post office lines or post offices, and the clerks in said terminal railway post offices shall be classified as railway postal clerks and progress successively to grade 4. * * * *Provided further*, That no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this Act.

When the above Act went into effect, all Grade 5 clerks assigned to terminals were ordered to be transferred to Grade 5 assignments in other parts of the service, and the legality of this feature of the order is not contested. However, it was further provided that they should be given the opportunity of remaining in the terminals, if they wished to do so, by accepting reclassification to Grade 4. The plaintiffs allege (and the appellant denies) that they were coerced into acceptance of the lower grade and contend further that even if their choices were voluntary their reclassifications were void.

This appeal relates to plaintiffs' laches with resulting financial loss to the Government; adequacy of plaintiffs' administrative remedies and their failure to resort to such remedies; plaintiffs' lack of need for the relief demanded in order to obtain immediate restoration, except as to back salary, and (as to back salary) lack of jurisdiction in the court below to grant relief in this action in the nature of *mandamus*; and to the legality of the reclassifications where such choices were clearly voluntary.

B. The basic facts

The Act of June 14, 1934, *supra*, was enacted in furtherance of an administrative plan to transfer all Grade 5 clerks from terminal railway post offices to other branches of the service.

pursuant to existing provisions of law," and thereafter to limit automatic promotions in the terminals to Grade 4. This plan was devised to diminish the disparity between salaries paid these and other postal clerks doing the same type of work, which had been a source of dissatisfaction in the Postal Service for a number of years (R. 17). As shown by the Committee reports⁴ in connection with the 1934 Act, the Congress had been fully apprised of the plan, and passed the legislation in order that it could be carried into effect (R. 19).

Prior to the Act of June 14, 1934, *supra*, railway post offices, terminals, and transfer offices in the Railway Mail Service were (and, with the exception of terminals, are) classified as Class A or Class B offices, depending upon their size.⁵ In Class A offices railway postal clerks can receive automatic promotions⁶ only as high as Grade 4 with a salary of \$2,300 per annum.⁷ In Class B offices clerks can progress to Grade 5 at \$2,450 per annum.⁸ Of course, clerks in Class A offices can obtain Grade 5 classification by obtaining transfers to Class B offices, and, conversely, it is necessary for Grade 5 clerks to accept reclassification to Grade 4 in order to obtain transfers to Class A offices. Also, such reclassification of clerks from Grade 5 to Grade 4 is required when, by reason of reduction of force or

³ The Act of August 24, 1912, c. 389, § 7, 37 Stat. 556 (39 U. S. C. § 624), provides:

"A clerk of any grade of any classification of railway post offices, terminal railway post offices, transfer offices, or in the office of a division superintendent or chief clerk, may be transferred and assigned to any classification of railway post offices, terminal railway post offices, transfer offices, or to an office of a division superintendent or chief clerk under such regulations as the Postmaster General may deem proper."

⁴ Reports of the Committees on Post Offices and Post Roads to accompany H. R. 9392, 73d Cong., 2d Sess., being H. Rept. No. 1430, May 1, 1934, and S. Rept. No. 1162, May 10, 1934. The House Report is quoted in full in the Senate Report, which is reproduced at R. 19-22.

⁵ Act of February 28, 1925, ch. 368, § 7, 43 Stat. 1062-1063; 39 U. S. C. §§ 617-619; Appendix, pp. 32-33, *infra*.

⁶ As used herein the phrase "automatic promotions" has reference to promotions provided for by the Act of February 28, 1925, ch. 368, §§ 7 and 11, 43 Stat. 1062-1063; 39 U. S. C. §§ 610, 611, 617-619, 627; appendix, pp. 32-33, *infra*.

⁷ *Ibid*.

⁸ *Ibid*.

otherwise, the offices to which they are attached are reclassified from Class B to Class A, if they wish to remain attached to such offices." Such practice has obtained in the Railway Mail Service since August 24, 1912 (R. 32-34).

The Act of June 14, 1934, *supra*, eliminated the former class distinction between terminals and limited the automatic promotion of terminal clerks to Grade 4. In passing this Act the Congress understood that all Grade 5 clerks would be transferred within about three years, with corresponding reductions in cost (R. 19, 22).

The present action grows out of the following facts recited in the Postmasters General's affidavit (R. 16 at 17-18):

* * * it was realized that the arbitrary transfer of Grade 5 clerks from terminals without consulting their wishes might impose hardships upon some of them, and it was, therefore, decided to follow the same plan in reassigning these clerks as was followed when a similar situation arose under the Reclassification Act of August 24, 1913 (39 U. S. Code 608)¹⁰ under which clerks would be given the privilege of requesting reclassification to Grade 4 in order to avoid transfer to other organizations if they preferred to do so;

That this procedure was approved by affiant solely for the benefit of the clerks concerned and without any intention of inducing the clerks to apply for reclassification to Grade 4; * * *

The basic instructions respecting transfers under the Act of June 14, 1934, were issued on June 16, 1934 (R. 25, 34-35), and provided, in part, as follows:

(a) Whenever a grade 5 vacancy that can be offered to terminal clerks becomes available in the division or on a nearby line in an adjoining division, it will be bulletined in the division terminals for five days and

¹⁰ The transfer of Grade 5 clerks who do not elect to remain in reclassified offices involves no reduction in their salaries. See Act of March 3, 1917, c. 162, 39 Stat. 1058, 1065; 39 U. S. C. 632; p. 31, *infra*.

¹¹ Act of August 24, 1912, c. 389, § 7, 37 Stat. 555-556; 39 U. S. C. § 608; appndix, p. 30, *infra*. Cf. R. 33, 34.

the senior applicant from the state to which the vacancy belongs will be recommended for transfer.

(b) If no applications are received, the junior grade 5 clerk will be recommended for arbitrary transfer unless he prefers to take reduction to grade 4 to continue in the terminal. Before submitting recommendations on Form 5030 for transfer or reduction, superintendents should ascertain the clerks' wishes in writing (R. 35).

At the time these instructions went into effect 2,174 Grade 5 railway postal clerks were assigned to the terminals. Of this number, 942, including most of the present plaintiffs, were reclassified to Grade 4 and continued in such assignment (R. 27). Later, in 1937, as a result of the decision of this Court in the case of *Farley v. Welch* (67 App. D. C. 382, 92 F. (2d) 533), 300 additional clerks in the terminals were determined to be entitled to Grade 5 classification. Of this number, 166 clerks, including seven of the present plaintiffs (R. 32), were reclassified to Grade 4 under the same arrangement (R. 27, 32).

C. The complaint and answer

It is alleged in the complaint (at R. 8-9) and admitted in the answer (at R. 11), that on July 14, 1934, the plaintiffs were railway postal clerks assigned to former Class B terminal railway post offices; that prior to such time they had advanced to Grade 5, which entitled each of them to a salary of \$2,450 per annum; that (with certain isolated exceptions stated in the answer which may be ignored for present purposes) each of them rendered and continued to render satisfactory service.

The complaint then charges that "the defendant, through his subordinate officers," caused "the plaintiffs to be demoted and reduced to Grade 4" and "classified" as "Grade 4 railway postal clerks," with corresponding reduction in salary from \$2,450.00 to \$2,300.00 per annum; that most of such reclassifications "occurred between September 1, 1935, and April 1, 1938"; and that "many of the plaintiffs were required to, and did, on orders from their superior officers * * *, sign statements¹¹ to the effect that they consented to such reductions,

¹¹ See paragraph (b) of instructions of June 16, 1934, above.

but said reductions were, in fact, not voluntary on the part of the plaintiffs, and said statements signed by said plaintiffs were signed under duress and compulsion" (R. 9).

It is admitted that the plaintiffs were reclassified to Grade 4, and the only issue of fact arising out of the above allegation is raised by the denial in the answer (at R. 11) that the plaintiffs did not voluntarily elect reclassification to remain in the terminals and that any purported consent to such reclassification signed by them was the result of duress and compulsion. (For the purposes of all questions sought to be raised on this special appeal, with the exception of one question relating to 27 of the plaintiffs [see pp. 25-26, *infra*], it can be assumed *arguendo* that, if tried, this issue would be decided against the defendant. This appears to be the only issue of fact which could become material to the decision of the case on the merits, and the present question is whether the case can be disposed of as to all, or most of the plaintiffs, on other issues, and thus avoid a long, expensive trial.)

In addition to the foregoing, it is alleged in the complaint (at R. 9-10) that the present case is "substantially the same as" five previous cases¹² brought by terminal railway postal clerks, in which judgments were entered in favor of the plaintiffs on February 7, 1939, after similar allegations had been proved to the satisfaction of the trial court; that the present plaintiffs expected that such suits would be regarded by the Post Office Department as test suits, but that "defendant has failed to do this and has, through certain of his subordinate officers, informed these plaintiffs that they must" resort to litigation to obtain the relief demanded. These averments are denied by the answer (at R. 11), either directly or for want of knowledge, but the issues thus raised, with the possible exception of one question (noted at p. 21, *infra*), do not appear to affect the questions presented on this appeal.

The answer sets up the further defenses: (1) that the District Court lacks jurisdiction to entertain the action (R. 11); (2) that the complaint fails to state a claim upon which

¹² Filed separately on February 14, 1938, and consolidated for trial as *United States ex rel. Ricci et al. v. Farley*, Law Nos. 89858-89862. Final judgments were entered February 7, 1939. (See R. 18.)

relief can be granted (R. 11); (3) that the plaintiffs are guilty of laches (R. 14-15); and (4) that the plaintiffs are estopped by their requests for, participation and acquiescence in, and acceptance of the benefits of their respective reclassifications to Grade 4 (R. 14-15).

D. The grounds of appellant's motion for judgment and the facts with reference thereto

The appellant's motion for judgment (R. 15-16) adopts all the defenses of the answer, and the following grounds are particularly relied on:

1. That the plaintiffs are guilty of laches (R. 14, 15, 16). In this connection, the facts shown by the complaint (at R. 9) and admitted by the answer (at R. 11) are that the majority of the plaintiffs were reclassified "between September 1, 1935, and April 1, 1938." The present action was not commenced until March 6, 1939 (R. 1). Additional facts shown by the affidavits are that all but eighteen of the present plaintiffs delayed bringing this suit, or otherwise complaining, for over three years; nine of them delayed over two years; and the remaining nine delayed over one year (R. 27-32). In the meantime the Grade 5 positions to which they would have been (and will be) transferred if they had been (or are to be) successful, have been filled by clerks who (because they were attached to Class A offices [see pp. 5-6, *supra*]) otherwise could not have advanced above Grade 4 (R. 27-32). (Hence, to restore Grade 5 salaries to the plaintiffs retroactively would mean a duplication of salaries which would not have occurred if plaintiffs had not slept on their rights.)

2. That the plaintiffs have not exhausted adequate administrative remedies available to them (R. 16). As shown by the affidavits (at R. 18, 25-26), at all relevant times the plaintiffs have had the right to appeal their grievances directly to the Postmaster General,¹³ but they have never done so, and

¹³ See, also, excerpts from §§ 10 and 12, Postal Laws and Regulations, 1932, p. 34, *infra*; Act of February 28, 1925, c. 368, § 11, 43 Stat. 1064; 39 U. S. C. 627; p. 33, *infra*.

no valid explanation or excuse for such failure (in most cases for over three years) is advanced by the plaintiffs.

3. That the case is moot as to the majority of the plaintiffs (R. 16). As to this the facts are that both in his answer (at R. 12-14) and affidavit (at R. 18-19) the Postmaster General has indicated his willingness to restore 17⁵ of the plaintiffs to Grade 5 and transfer them out of the terminals, upon their submission of affidavits showing that they "did not freely and without compulsion elect to remain in the terminal at Grade 4 rather than be transferred to a Grade 5 vacancy out of the terminal" (as shown above, they always had the right to apply for this relief but never did so); but he makes no commitment as to whether back salary will be paid. As shown by the official records fifty-three other plaintiffs have left the postal service (R. 22), or have transferred to other parts of it (R. 24-25), or now occupy Grade 5 or Grade 6 positions (R. 23). (In other words, 227 plaintiffs have no occasion to apply to the Court for restoration to Grade 5. Their only interest in the matter is to obtain the back salary which, under their theory, has accumulated over the period in which they have delayed bringing this action. Hence the question here is whether the action can be employed for such purpose.)

4. That it is clear that at least twenty-seven¹⁴ plaintiffs were properly reclassified to Grade 4 upon their own voluntary requests (R. 16). As shown by the affidavits reflecting the official records of the Post Office Department, sixteen of them, having originally transferred to Grade 5 positions out of the terminals, sought reclassification to Grade 4, in order to return to the terminals (R. 22, 23-24), and eleven of them sought reclassification in order to obtain cancellation of transfers out of the terminals already ordered or applied for (R. 24). These facts are alleged in the answer (at R. 13-14) and are shown by an uncontested affidavit (at R. 22, 23-24), but they are inconsistent with, at least, the implication of the unverified allegation of the complaint (R. 9) to the general effect

¹⁴ ~~Four~~ ^{Five} of this number are also included in the previous paragraph; i. e., Oliver M. Bradshaw and Leslie R. Talbott are now in Grade 5 (R. 23); and Frank W. Joesten and Ernest L. Stowe have retired from the service (R. 22, 24);

Alfred J. Morgan is a non-discriminator (R. 24).

that the reclassifications were not voluntary and that any contrary statements signed by the plaintiffs "were signed under duress and compulsion." (See p. 8, *supra*.)

STATUTES AND REGULATIONS INVOLVED

The relevant parts of the statutes and regulations primarily involved are set out in the Appendix, pp. 30-34, *infra*.

The instructions of June 16, 1934, with reference to the Terminal Reclassification Act of June 14, 1934, appear at R. 34-35. The legislative committee reports on the same Act appear at R. 19-22.

STATEMENT OF POINTS

The appellant intends to rely upon the following points:

1. The plaintiffs are estopped from prosecuting this action and they are barred from any right to the relief demanded, by reason of their laches; by reason of their acquiescence in their reclassifications from Grade 5 to Grade 4, of which they complain; and by reason of their unjustified delay, in asserting their claims, to the financial detriment of the United States.

2. The plaintiffs have not exhausted nor even resorted to their available administrative remedies, which must be invoked before their right to judicial relief can arise.

3. The case, so far as judicial restoration of status is sought, is moot as to all the plaintiffs (except those whose names appear only in subparagraphs (d), (e), and (f) of paragraph 7 of the amended answer, R. 13-14), because, either such plaintiffs are no longer employed as railway postal clerks, or they already occupy Grade 5 or Grade 6 positions, or, by verifying their present allegations (as stated in paragraph 6 of the amended answer, R. 12), they will be restored to Grade 5 by administrative action. The present action will not lie merely for the purpose of compelling payment of back-salary claims against the Government.

4. Each of the plaintiffs named in subparagraph (d), (e), and (f) of paragraph 7 of the amended answer was properly and lawfully reclassified from Grade 5 to Grade 4 upon his own voluntary request, and has no just cause for complaint.

SUMMARY OF ARGUMENT

I

The appellees are guilty of laches and they are barred and estopped by their long acquiescence in their reclassifications to the financial detriment of the United States.

The object of the terminal reclassification plan was to eliminate Grade 5 clerks from the terminals by transfers to be completed within a period of three years and to replace such clerks with employees whose advancement would be limited to Grade 4. Economy was one of the purposes which the Congress had in mind.

It was the plaintiffs' duty to assert their claims promptly and their breach of duty deprives them of a right to do so now. Moreover, the facts clearly show that the United States will have been prejudiced by their delay if they obtain the relief which they now demand, because duplication of salaries would result.

II

The plaintiffs have not exhausted nor even resorted to available administrative remedies; therefore they are not entitled to judicial relief.

The plaintiffs have not requested the appellant to take the action which they now request the District Court to command, notwithstanding the fact that departmental regulations provide for appeals to his office.

It is settled that the mandamus jurisdiction cannot be invoked against a public officer until he has been requested to take the action sought and until administrative remedies have been exhausted. At least this is true unless it plainly appears that it would be futile to make the request or to seek the remedy, and such is not the present case.

III

The present action is moot as to the majority of the present plaintiffs. All but twenty-three of the present plaintiffs either have left the service, have transferred to other parts of it, already occupy Grade 5 or Grade 6 positions, or (under an

administrative order made since suit begun) by verifying their present allegations will receive automatic administrative restoration to Grade 5 as of the beginning of the quarter in which they request restoration. Their only interest in the action is to obtain payment of their back-salary claims. The action will not lie merely for the purpose of compelling payment of back-salary claims, there being no jurisdiction to grant such relief in this action in the nature of mandamus.

The plaintiffs' claims for salary are claims against the United States to which the Government has a probable defense in the Court of Claims. It is not the appellant's ministerial duty to pay them or to arrange for their payment. Moreover, the plaintiffs have an adequate remedy in the Court of Claims, and in these circumstances the former mandamus jurisdiction of the District Court cannot properly be invoked. The United States is not named as a defendant and the action could not be brought under the Tucker Act.

Additional objections are that the action will not lie merely to *establish* a legal right nor can it be made to serve the purpose of an ordinary suit.

IV

None of the plaintiffs who voluntarily requested reclassification has a valid cause of action.

Uncontested affidavits establish that twenty-seven of the plaintiffs (including the twenty-three plaintiffs to which part III *supra* does not apply) were reclassified to Grade 4 upon their own requests, either for the purpose of returning to the terminals from other assignments or in order to obtain the cancellation of transfers out of the terminals already ordered or applied for.

The plaintiffs' contention that such voluntary reclassifications were prohibited by the statute should not be sustained. The privilege of electing reclassification had been accorded to clerks in similar situations for many years, and it should not be assumed that the Congress intended to deprive them of it. Especially is this true in the light of the fact that the *proviso* was a reenactment of a provision in a prior reclassification Act which had been in effect during much of the time since the

practice of permitting voluntary clerk reclassification has been in force.

The plaintiffs' cases are readily distinguishable, in that they relate to offices for which single, inflexible salary rates are prescribed by law, and do not purport to pass upon the question of election as between grades.

Any doubt as to the prior legality of permitting voluntary reclassifications is settled by the administrative practice over many years, and there is nothing either in the language or the history of the 1934 Act to indicate that the Congress intended to deprive the clerks of that privilege. The Act is phrased so as to permit voluntary reclassifications and, at least, is ambiguous in that respect and should be so construed as to harmonize with the existing practice.

ARGUMENT

I

The appellees are guilty of laches and they are barred and estopped by their long acquiescence in their reclassifications to the financial detriment of the United States

As shown at p. 9, *supra*, all but eighteen of the appellees delayed commencing an action or complaining to the appellant through administrative channels, for more than three years; nine of them delayed more than two years; and the remaining nine delayed for more than one year.

The whole purpose of the administrative and legislative plan in connection with the Act of June 14, 1934, was that Grade 5 clerks should be transferred from the terminals and replaced by clerks who could not be promoted above Grade 4 so long as they remained in the terminals. The reports of the congressional committees (R. 19-22) in charge of the bill indicate that economy in the future operation of the terminals was one of its purposes. The reports are, in part, as follows (R. 19):

This bill would eventually limit the successive promotions to grade 4, *thereby reducing the cost of operation* in the future without reducing the clerks now assigned to these terminal railway post offices in rank or salary;

those now in grade 5 will be transferred to grade 5 positions in road service, as vacancies occur, and replacements in the terminals will limit advancement to grade 4. [Italics supplied.]

The affidavit of Mr. Deitz, Chief of Personnel of the Railway Mail Service, clearly discloses (at R. 27-32) that this program of transfers could and would have been completed within the three years mentioned by the Congressional committees (at R. 22) but for litigation. It further shows that all the present plaintiffs could and would have been transferred to Grade 5 positions out of the terminals if they had not elected, accepted, or acquiesced in, their reclassifications and that they could and would have been so transferred soon after their reclassifications, had they sought and obtained restoration to Grade 5. It further shows that such transfers would have made it unnecessary to fill Grade 5 vacancies by transferring and promoting lower grade clerks *who could not otherwise have advanced to Grade 5* (see explanation at pp. 5-6, *supra*). Thus, retroactive restoration of Grade 5 salaries to the plaintiffs would actually constitute duplication of Grade 5 salaries which have been paid but would not have been paid if the plaintiffs had not slept on their rights.

It is settled that an employee of the United States who intends to complain of unlawful deprivation of an office or its emoluments, is under a duty to do so promptly, and to seasonably advise the Government of his attitude with regard thereto.

In *Norris v. United States*, 257 U. S. 77, a Customs Inspector who had been removed from office in violation of Section 6 of the Act of August 24, 1912 (p. 30, *infra*), waited for eleven months before complaining to the Secretary of the Treasury of his unlawful removal. The Secretary reinstated him for the purpose of affording him a hearing under the statute, and he was exonerated of the charges. However, he was again dismissed—this time upon the ground that his services were no longer needed. He filed his suit in the Court of Claims for payment of salary, for the period between his unlawful discharge and his reinstatement, upon the ground that he had never been separated from the service in contem-

plation of law. It was held that his laches barred recovery, the Supreme Court saying (pp. 80-81):

The question here is: Did Norris use reasonable diligence, in view of the obligation placed upon him, notwithstanding his wrongful removal, to assert his right to the compensation attached to the office? It is true that it has been found that he was ready, willing, and able to discharge its duties, but no fact is found explaining his failure to assert his right to the office, or its emoluments, for the period of eleven months and a little over. He did not, as did Wickersham (201 U. S. 390), promptly demand a restoration to the office, nor make any claim to its emoluments because the power of removal had been exercised without giving him the opportunity for a hearing which the statute affords. Each case must be decided upon its own facts, and we are of the opinion that the findings here do not disclose that exercise of reasonable diligence on Norris' part which the law imposes upon him as a duty if he would recover compensation for services in an office which the Government might fill with another, or otherwise adjust its service so as to dispense with the service of the plaintiff. Public policy requires reasonable diligence upon the plaintiff's part, which we think the findings in this record do not disclose.

Also the following language of *Nicholas v. United States*, 257 U. S. 71, 76-77, is apposite here:

Public policy requires that the Government shall be seasonably advised of the attitude of its officers and employees attempted to be displaced when they assert illegal removal or suspension as a basis for the recovery of the office or its emoluments. * * * The findings in this case disclose that plaintiff took no steps to question the order dismissing him from the service, nor to ask for a copy of the charges upon which he was removed. * * * We hold, therefore, as did the Court of Claims, that such a lack of diligence evidenced an abandonment of his title to the office, and of his right to recover the emoluments thereof.

There appears to be no sound basis in principle upon which the above cases can be distinguished from the instant case.

In the case of *Caswell v. Morgenthau*, 69 App. D. C. 17, 98 F. (2d) 296, 298 (certiorari denied, 305 U. S. 596), this Court said:

We prefer * * * to place our affirmance on the ground of laches. * * * He brought his petition a little more than 18 months after his cause of action—if he had one—arose. In like circumstances we declined to consider the merits of the controversy and held that an unreasonable delay in bringing the action was of itself sufficient to justify refusing the writ—*U. S. ex rel. Arant v. Lane*, 47 App. D. C. 336. * * *

The difference in the period of delay in the *Arant* case and this case is that one was twenty months and the other eighteen, and where the same question has arisen under more or less similar statutes in New York and other states the answer has been the same where as little as four months' delay ensued. [Citing cases.] The same result is reached in actions brought in the Court of Claims to recover compensation. Cf. *Nicholas v. United States*, 257 U. S. 71, 76; *Norris v. United States*, 257 U. S. 77, 80. Appellant having failed to take prompt action to assert his rights, sound public policy requires a denial of the writ.

See, also, *Cromwell v. Doyle*, 69 App. D. C. 215, 99 F. (2) 448 (certiorari denied, 306 U. S. 640).

Moreover, in the present case it plainly appears that, if the plaintiffs should be accorded the full relief which they demand, their delay in asserting their claims will have resulted in duplication of Grade 5 salary payments, which otherwise would have been made but once. The importance of this fact is shown by the language of the Supreme Court in *Arant v. Lane*, 249 U. S. 367, 372 (affirming 47 App. D. C. 336), as follows:

When a public official is unlawfully removed from office * * * obvious considerations of public policy make it of first importance that he should promptly

assert his rights, to the end that if his contention be justified *the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.* [Italics supplied.]

Both of these factors are present in the instant case.

In the case of *Chamberlain v. United States*, 66 C. Cls. 317 (certiorari denied 279 U. S. 845), the Court of Claims said:

He failed to exercise his remedy, but without excuse left the Government in such a situation that if his claim was sustained *two salaries would be paid* for a single service. In the language used by the court in *Arant v. Lane, supra*, "the manifest inequity which would result from reinstating him *renders the application of the doctrine of laches to his case peculiarly appropriate* in the interests of justice and sound public policy." [Italics supplied.]

It is submitted, therefore, that the District Court erred in declining to apply the doctrine of the above-mentioned cases, and that this action should be dismissed because of the tardy assertion of the plaintiffs' claims.

II

The appellees have not exhausted nor even resorted to available administrative remedies, and therefore they are not entitled to judicial relief

In the present action the plaintiffs seek to invoke the former mandamus jurisdiction of the District Court, upon the theory that the appellant is under a ministerial duty to accord to the plaintiffs the administrative relief which they request the Court to command. However, it is not alleged in the complaint that the plaintiffs have attempted to obtain from the appellant the relief which they now demand, or to bring their grievances to his attention in any way prior to the filing of this action. If subordinate officers of the Post Office Department caused the plaintiffs to be reduced from Grade 5 to Grade 4 against their will, as alleged, clearly such officers violated their instructions from the appellant. (See R. 17-18,

25-26, 34-35.) It is self-evident that, as far as possible, inter-departmental administrative difficulties should be adjusted within the departments concerned, and that resort should not be had to the courts until the available administrative remedies have been exhausted.

To state the matter in another way, the Congress has made it the duty of the Postmaster General to "superintend generally the business of the department, and execute all laws relative to the Postal Service,"¹⁵ and has authorized him "to prescribe regulations, not inconsistent with law, for the government of his department" and "the conduct of its officers and clerks."¹⁶

In the performance of such duty it has been necessary to set up a vast administrative organization and system of controls. Among such controls it is provided that appeals from the decisions of his immediate subordinates may be taken to the head of the Department.¹⁷ (In these circumstances at least there is a serious question as to whether intervention by the courts prior to the taking of such appeals would constitute an exercise of the judicial power as defined by the Constitution.)

No administrative appeal has been taken to the Postmaster General from the action of the Second Assistant Postmaster General in reclassifying any plaintiff, or through application for restoration, although such appeals are provided for and could have been taken¹⁸ (R. 25-26).

Although the appellant has issued appropriate instructions (see R. 18-19) to cause automatic machinery to be set up whereby the majority of the plaintiffs can receive restoration to Grade 5 by simply verifying the allegations of the present complaint, this does not preclude any plaintiff, or other clerk, from bringing the peculiar facts of his case to the attention of the Postmaster General, with the request that he take any action which he has the authority to take.

¹⁵ R. S. § 396; 5 U. S. C. § 369.

¹⁶ R. S. § 161; 5 U. S. C. § 22.

¹⁷ Sec. 10, Postal Laws and Regulations, 1932, p. 34, *infra*.

¹⁸ See excerpts from §§ 10 and 12, Postal Laws and Regulations, 1932, p. 34, *infra*; Act of February 28, 1925, c. 368, §11, 43 Stat. 1064, 39 U. S. C. 627; p. 33, *infra*.

The fundamental defect in the plaintiffs' case in this connection is that their causes of action depend upon the establishment of the fact that the appellant has *declined* to perform a legally imposed duty, and it is clear from the record that he has never been called upon to perform the duty here contended for. Certainly there is no duty upon his part to rectify the alleged wrongs until he is advised of them and is supplied with satisfactory evidence that they exist.

As stated in *Ex parte Rowland*, 104 U. S. 604, 617:

The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy.

It is fundamental that the writ would not lie where there was any other adequate remedy, and this rule applied to judicial and administrative remedies alike. Thus, where adequate administrative remedies were provided, proceedings in *mandamus* were not permitted until such remedies were exhausted.¹⁹

In *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117 (affirming 55 App. D. C. 229, 4 F. (2d) 422), it was held that an attorney who had been denied admission to practice before the Board was required to demand a hearing by the Board before he was entitled to take action against it. Said the Court (p. 123):

Until he had sought a hearing from the Board, and been denied it, he could not appeal to the courts for any remedy and certainly not for *mandamus* to compel enrollment.

¹⁹ E. g., *McDuffie v. Kawley*, 50 App. D. C. 137, 269 Fed. 479 (respondent examining board was willing to re-examine relator); *Robertson v. Baff*, 52 App. D. C. 177, 285 Fed. 911 (Patent Office Board willing to grant disbarred attorney, the relator, a re-hearing); *Langley v. Bowen*, 6 D. C. 196 (relators excluded from election lists had further opportunity to press their cases upon respondent election judges); *Western Union v. Interstate Commerce Commission*, 51 App. D. C. 334, 279 Fed. 316, error dismissed, 260 U. S. 756 (respondents willing to hear relator further upon question of admissible items of valuation).

See, also, *United States v. Interstate Commerce Commission*, 290 Fed. 264, 53 App. D. C. 289, 295 (affirmed 264 U. S. 64).

While the rule is peculiarly applicable to actions based upon the former mandamus jurisdiction, it is by no means confined to them.²⁰ Thus, in the case of *Watson v. United States* (C. C. A. 5, 1939), 307 F. (2d) 1, in which a former railway postal clerk who had been separated from the service involuntarily, sued to recover amounts deducted from his pay for the Civil Service Retirement and Disability Fund, it was held that his complaint was properly dismissed for failure to allege exhaustion of all administrative remedies. There, as here, the statutes provided for the promulgation of administrative regulations, and there, as here, such regulations provided for administrative appeal. Said the Court (p. 2):

We agree with the appellee * * * that the complaint should have been dismissed for failure to allege that all administrative remedies provided had been exhausted.

* * * * *

We think it clear that the law and the regulations enacted pursuant to it make prior resort to the Commission an essential prerequisite to suit. *Dismuke v. United States* [297 U. S. 167, 173, 174].

The complaint contains no allegation which satisfactorily meets this requirement. While it is true that the complaint does allege (at R. 9-10) that contrary to the plaintiffs' expectations they did not receive the relief, which they now demand, as a result of the former cases (see p. 8, *supra*) and that the appellant "through certain of his subordinate officers, informed these plaintiffs that they must institute litigation in

²⁰ The requirement that administrative remedies be exhausted before asking judicial relief has been applied in tax cases (*First National Bank v. Board of County Commissioners*, 264 U. S. 450): under a state "Blue Sky Law" (*Porter v. Investor's Syndicate*, 286 U. S. 461, affirmed on rehearing, 287 U. S. 346); under the immigration laws (*United States v. Sing Tuck*, 194 U. S. 161); and in many other cases. See notes: Administrative Action as Prerequisite to Judicial Relief, 35 Columbia Law Review, pp. 230-246; Primary Jurisdiction—Effect of Administrative Remedies on Jurisdiction of Courts, 51 Harvard Law Review, pp. 1251-2167.

order" to obtain it; such allegation, even if it were true,²¹ would fall short of the requirement.

It is self-evident that no subordinate officer is authorized to deny an administrative appeal to the Postmaster General before it is applied for. However, in any event, the information alleged to have been received was untrue (see R. 18, 26) and its receipt could not give rise to a cause of action which did not exist theretofore. Nor does the plaintiffs' alleged expectations during the pendency of the former suits from February 14, 1938, to February 7, 1939 (R. 18), or the alleged receipt of such erroneous information thereafter, constitute a valid explanation for their *previous* failure (in most cases for over two years) to seek administrative relief.

It is submitted, therefore, that at least until the plaintiffs have exhausted their administrative remedies, they are not entitled to the judicial relief which they now demand.

III

This case has become moot as to the majority of the present plaintiffs by supervening events making improper the judicial restoration of status, and because there is no jurisdiction in this action to compel payment of back-salary claims. As to many others, circumstances antedating the action preclude judicial restoration of status

As pointed out at p. 10, *supra*, 227 of the present plaintiffs have no occasion to apply to the Court for restoration to Grade 5. All of them either have left the postal service (prior to

²¹ In support of the motion for summary judgment, appellant submitted an affidavit denying the allegation after due inquiry (R. 26). Appellees failed to submit answering affidavits, on this matter, peculiarly within their own knowledge, and are bound by the denial. Cf. *Kirby v. Tallmadge*, 160 U. S. 379, 383; *Georgia Casualty Co. v. Hoage*, 59 F. (2d) 870, 61 App. D. C. 196, 198. As stated in the petition for special appeal (p. 17) it is believed that the allegation was made as the result of mistaken information and that no officer in the Postal Service made any such representation.

action commenced), have transferred to other parts of it (prior to action commenced), now occupy Grade 5 or Grade 6 positions (by reason of reclassification prior^{and subsequent} to action commenced), or (pursuant to an administrative order made after commencement of this action), by verifying the allegations of the present complaint, will be restored to Grade 5 under administrative instructions which have been issued. Their only interest in the present action is to obtain the back salary which, under their theory, has accumulated over the period in which they have failed to assert their claims.

Of course, a suit to recover judgment in the amount of the back-salary claims would have to be brought against the United States. Such suit could be brought only in the Court of Claims because in Section 24 (20) of the Judicial Code, 28 U. S. C. 41 (20), the Congress expressly withheld jurisdiction of cases brought to recover salary or compensation for official services, from the district courts, and this provision has been held to apply to suits brought by employees in the postal service. *United States v. McCrory* (C. C. A. 5), 91 Fed. 295; *Foshay v. United States* (D. C., S. D., N. Y.), 54 F. (2d) 668.

Therefore, in respect of the cases of these plaintiffs this is a suit in effect against the United States without its consent. Certainly it is not the ministerial duty of the appellant to pay, or acknowledge the validity of, back-salary claims (see R. 18-19) as to which the Court of Claims might reasonably hold that the United States has a valid defense. (See e. g., pp. 15-18, *supra*.) Nor is it within his power to make such payments in full.²² Moreover, the availability of an adequate remedy in the Court of Claims in and of itself is sufficient to defeat the present action.

²² It is clear that administrative payment of such claims could not reach back for more than two years in absence of deficiency appropriations. See R. S. 3690; 31 U. S. C. § 712, and Act of June 20, 1874, c. 328, § 5, 18 Stat. 110, 31 U. S. C., §§ 713, 715. While, clearly, it would not be his ministerial duty to do so, he might, in a proper case, deem it just and in the public interest to take appropriate steps to obtain authority to pay such a claim.

In the case of *Brown v. Root*, 18 App. D. C. 239, an Army officer, claiming that he had been unlawfully dismissed from the service, filed a petition demanding the issuance of a *mandamus* to the Secretary of War to compel the latter to muster out and honorably discharge the petitioner at the time the other members of the organization were mustered out. In affirming the dismissal of the petition this Court (pp. 243-244) said:

It is true, relator charges as a grievance that he had been unable to obtain pay for his services because of his unauthorized dismissal. This is upon the assumption necessarily, that not having been lawfully dismissed [from] the service, his salary continued to run until his regiment was actually mustered out. But this court could not take jurisdiction of an action either to compel the payment of his salary or to ascertain the validity of his claim thereto. The United States cannot be sued save by their own consent and then only in the particular court that they may designate for the purpose. Recognizing this familiar principle, no such relief has been asked.

All that could be accomplished by a judgment in relator's favor, as prayed for, would be the expression of an opinion that his dismissal from the service
 * * * was not within the power of his commanding general at the time. * * *

* * * * *

The United States Court of Claims would, probably, have jurisdiction of an action by the relator to establish the validity of his claim to salary accruing after the date of his dismissal.

The maintenance of such an action would necessarily involve the decision of the single question sought to be adjudicated here.

Assuming that such jurisdiction exists would furnish another reason for refusal of relief by way of *mandamus*, for that writ lies only in plain cases and where there is no other legal remedy.

Without intimating any opinion in respect of the validity of the proceeding of the court-martial, and for the reasons given above, the judgment appealed from will be affirmed with costs.

In the case of *Phillips v. Ballinger*, 35 App. D. C. 520, 523, upon similar considerations this Court declined to require the respondent to make an order of restoration to departmental practice expressly retroactive.

These cases are in line with the fundamental principles that the "purpose of mandamus is not to establish a legal right, but to enforce one already established" and that the "right involved must also be substantial and not a mere abstract right." *Stowell v. Deming*, 57 App. D. C. 223, 224, 19 F. (2d) 697, certiorari denied 275 U. S. 531. Also, "under the established rule the writ of mandamus cannot be made to serve the purposes of an ordinary suit." *United States v. Wilbur*, 283 U. S. 414, 420 (affirming 60 App. D. C. 11); *Girard Co. v. Helvering*, 301 U. S. 540, 544 (affirming 66 App. D. C. 64).

It is submitted, therefore, that the action is moot as to the vast majority of the plaintiffs and should be dismissed.

IV

None of the plaintiffs who voluntarily requested reclassification has a valid cause of action

As shown at p. 10, *supra*, at least 27 of the plaintiffs were reclassified to Grade 4 upon their own voluntary requests. Sixteen of them, having originally transferred to Grade 5 positions out of the terminals, sought reclassification to Grade 4 in order to return to the terminals, and eleven of them sought reclassification in order to obtain cancellation of transfers out of the terminals already ordered or applied for.

The above facts are alleged in the answer (at R. 13-14) and are shown by an affidavit (at R. 22, 23-24) reflecting the official records of the Post Office Department. It is not clear from the complaint that the requests signed by these plaintiffs were intended to be included within the meaning of the term "statements" so as to bring them within the factual allegation (at R. 9) that the reclassifications were involuntary,

but, in any event, it is submitted that the uncontested affidavits filed in support of the motion for judgment are controlling. If Rule 56 of the Rules of Civil Procedure could be defeated by mere silence it would, of course, be worthless.²³

However, it is contended on behalf of the plaintiffs that even if the reclassifications were voluntary they were nevertheless violative of the Act of June 14, 1934, c. 522, 48 Stat. 962; 39 U. S. C. § 618a (p. 33, *infra*), in which it is provided:

That no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this Act.

At pp. 4-7 and 14-15, *supra*, it was pointed out that the Act of June 14, 1934, was enacted in furtherance of an administrative plan to transfer all Grade 5 clerks from the terminals and thereafter to limit promotions to Grade 4. It was further pointed out (pp. 5-6, *supra*) that since August 24, 1912, it has been the practice in the Railway Mail Service to permit clerks whose grades were too high to permit them to remain in reclassified offices to elect reclassification to lower grades in order to remain, if they chose to do so, and that Grade 5 clerks are permitted to transfer to Class A offices by electing reclassification to Grade 4. It is clear, also, that the instructions of June 16, 1934, permitting the same procedure under the Act of June 14, 1934, were approved by the Postmaster General for the benefit of the clerks concerned (see pp. 6-7, *supra*).

We submit that the short answer to the plaintiffs' contention is that the Congress included the above-quoted *proviso* in the Act of June 14, 1934, for the purpose of protecting the clerks and that it did not intend that the Act should be construed to deprive them of a privilege or a choice which they would otherwise have.

Language similar to that of the *proviso* appeared in Section 6 of the Act of August 24, 1912, c. 389, 37 Stat. 555; 5 U. S. C. 652 (p. 30, *infra*) which prohibited dismissals from the service without the prior preferment of charges. There the statement

²³ See *Means v. McFadden Publications*, 25 F. Supp. 993, 994; *Culkane v. Jackson Hardware Co.*, 25 F. Supp. 324; *Hufner v. Erie R. Co.*, 26 F. Supp. 855.

is that "copies of charges," etc., "shall be made a part of the records of the proper department or office, as shall also the reasons for *reduction in rank or compensation*." Obviously the word "reduction" here has reference to *involuntary* lowering of rank or salary.

The language again appeared in Section 11 of the Act of February 28, 1925, c. 368, 43 Stat. 1065; 39 U. S. C. § 131 (p. 33, *infra*), which provided for the classification not only of all the offices of the Railway Mail Service but of the entire *Postal Service* as well. In that Act the language is practically identical with the language of the present *proviso*.

The Act of June 14, 1934, which, in effect, amended the 1925 Act with regard to the classification of terminals (see R. 20) also carried forward its provision that "no employee in the *Postal Service* shall be reduced in rank or salary as a result" of the provisions of the Act.

So far as we are aware it has never been contended that the *proviso*, as it appeared in the 1925 Act, prevented voluntary reclassifications to lower grades.

The cases heretofore cited²⁴ in support of the plaintiffs' argument are readily distinguishable from the instant case. In each of them the Congress had created an office, and in each of them it had said, in effect, that the officer *shall* be paid a stated salary in a prescribed amount (see, e. g., *Glavey v. United States*, 182 U. S. 595 at 610). In such cases the implicit, inflexible command of the Congress is that the officer shall not be paid more or less than the prescribed amount and it is held that no executive officer is authorized to enter into a contract or arrangement as between the United States and a person appointed to such office to alter such compensation. In the cases of postal employees no single inflexible compensation is prescribed, but a scale is provided upon which the employees may move up or down, within limits, in accordance with circumstances (e. g., if their services are satisfactory they eventually reach a top limit, but if they are not satisfactory, they may be moved downward).

²⁴ Plaintiffs cited *Glavey v. United States*, 182 U. S. 595; *Miller v. United States*, 103 Fed. 413; *Geddes v. United States*, 38 C. Cls. 428; *Hartman v. United States*, 40 C. Cls. 133; *Adams v. United States*, 20 C. Cls. 115.

There is nothing in the statutes (other than the *proviso* in question) which could be construed to prohibit the clerks from voluntarily electing reclassification to lower grades when they feel that it is to their advantage to do so. All doubt of this is removed by the long-settled practice of permitting such reclassifications (R. 32-33), which constitutes an administrative construction "entitled to great weight and should not be overturned except for cogent reasons" (*United States v. Chicago North Shore R. Co.*, 288 U. S. 1, 13).

If it be admitted that the clerks had the lawful privilege of electing reclassification to lower grades prior to June 14, 1934, what in the Act of that date compells the conclusion that the Congress intended that it be taken away? Ordinarily such language as "no employee * * * shall be reduced" would not be thought to describe action initiated by the subject of the passive verb.

In *United States v. Jefferson Electric Co.*, 291 U. S. 386, 396, the Supreme Court said:

As a general rule, where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown.

Again, in *Puerto Rico v. Shell Co.*, 302 U.S. 253, 258, it was said:

Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the law makers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.

While it is true that the present plaintiffs could have returned to or remained in the terminals at Grade 5 if the Act of June 14, 1934, had not been enacted it is clear that after

it was passed they would not have been permitted to do so if they had remained in Grade 5, and, it is submitted, the Congress did not intend to deprive them of their well-established privilege of electing reclassification to a lower grade in order to obtain or retain assignment to the reclassified terminals.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the orders of the District Court overruling the appellant's motions for judgment should be reversed and the action should be dismissed.

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APPENDIX

I

STATUTES INVOLVED

A. Act of August 24, 1912, c. 389, 37 Stat. 539, 555-556:

SEC. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; [5 U. S. C. 652] * * *

SEC. 7. That after September thirtieth, nineteen hundred and twelve, the Postmaster General may appoint railway postal clerks in such manner and of such respective grades and salaries as may be provided for in the annual appropriation acts for the service of the Post Office Department, for the purpose of sorting and distributing the mail in railway post offices, railway post-office terminals and transfer offices, and for service in the offices of division superintendents and chief clerks, and as transfer clerks and such other services as may pertain to the Railway Mail Service. Such clerks shall be designated as railway postal clerks [39 U. S. C. 609] and shall

be divided into the following grades, with corresponding salaries per annum not exceeding the following rates:

Grade one, at not exceeding nine hundred dollars.

* * * * *

Grade ten, at not exceeding one thousand eight hundred dollars.

Chief clerks, at not exceeding two thousand dollars.

The Postmaster General shall classify and fix the salaries of railway postal clerks, under such regulations as he may prescribe, in the grades provided by law; and for the purpose of organization and of establishing maximum grades to which promotions may be made successively as hereinafter provided, he shall classify railway post offices, terminal railway post offices, and transfer offices with reference to their character and importance in three classes, with salary grades as follows: Class A, nine hundred dollars to one thousand two hundred dollars; class B, nine hundred dollars to one thousand three hundred dollars; and class C, nine hundred dollars to one thousand five hundred dollars. He may assign to the offices of division superintendents and chief clerks such railway postal clerks as may be necessary and fix their salaries within the grades provided by law without regard to the classification of railway post offices. [39 U. S. C. 608.] * * *

A clerk of any grade of any classification of railway post offices, terminal railway post offices, transfer offices, or in the office of a division superintendent or chief clerk, may be transferred and assigned to any classification of railway post offices, terminal railway post offices, transfer offices, or to an office of a division superintendent or chief clerk under such regulations as the Postmaster General may deem proper. [39 U. S. C. 624.] * * *

B. Act of March 3, 1917, c. 162, 39 Stat. 1058, 1065:

* * * That hereafter when railway postal clerks are transferred from one assignment to another because of changes in the service their salaries shall not be reduced by reason of such change: * * * [39 U. S. C. 632.]

C. Act of February 28, 1925, c. 368, 43 Stat. 1053, 1061-1063, 1064, 1065:

Sec. 7. That the annual salaries of employees of the Railway Mail Service shall be as follows: * * *

That railway postal clerks shall be divided into two classes, class A and class B, and into seven grades with annual salaries as follows: Grade 1, salary \$1,900; grade 2, salary \$2,000; grade 3, salary \$2,150; grade 4, salary \$2,300; grade 5, salary \$2,450; grade 6, salary \$2,600; grade 7, salary \$2,700. [39 U. S. C. 610]. * * *

All original appointments shall be made to the rank of substitute railway postal clerk, and promotions shall be made successively at the beginning of the quarter following a total satisfactory service of three hundred and six days in the next lower grade. [39 U.S.C. 611.] * * *

Railway post-office lines shall be divided into two classes, class A and class B, and clerks assigned to class A lines shall be promoted successively to grade 4 and clerks in charge to grade 5. Clerks assigned to class B lines shall be promoted, successively to grade 5 and clerks in charge to grade 6: *Provided*, That lines in present class A shall be continued in class A, and lines in present class B shall be continued in class B. [39 U. S. C. 617.]

Terminal railway post offices shall be divided into two classes, class A and class B; those having less than twenty employees shall be assigned to class A, and those having twenty or more employees shall be assigned to class B. Clerks in class A terminals shall be promoted successively to grade 4, and clerks in charge of tours to grade 5. Clerks in class B terminals shall be promoted successively to grade 5, and clerks in charge of tours to grade 6. [39 U. S. C. 618.]

Transfer offices shall be divided into two classes, class A and class B; those having less than five employees shall be assigned to class A and those having five or more employees to class B. Clerks in class A shall be

promoted successively to grade 4, and clerks in charge of tours to grade 5. Clerks in class B shall be promoted successively to grade 5, and clerks in charge of tours to grade 6. [39 U. S. C. 619]. * * *

Sec. 11. * * *

Whenever an employee herein provided for shall have been reduced in salary for any cause, he may be restored to his former grade or advanced to an intermediate grade at the beginning of any quarter following the reduction, and a restoration to a former grade or advancement to an intermediate grade shall not be construed as a promotion within the meaning of the law prohibiting advancement of more than one grade within one year. [39 U. S. C. 627]. * * *

All employees herein provided for in automatic grades who have not reached the maximum grades to which they are entitled to progress automatically, shall be promoted at the beginning of the quarter following the completion of one years' satisfactory service since their last promotion, regardless of any increases in salaries granted them by the provisions of this title. [39 U.S.C. 627]. * * *

No employee in the Postal Service shall be reduced in rank or salary as the result of the provisions of this title. [39 U.S.C. 131].

D. *Act of June 14, 1934, c. 522, 48 Stat. 962:*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the terminal railway post office system shall be maintained for the purpose of handling and distributing mail not handled or distributed in railway post office lines or post offices, and the clerks in said terminal railway post offices shall be classified as railway postal clerks and progress successively to grade 4. Clerks in charge of terminals, tours, or crews consisting of less than twenty employees shall be of grade 5. Clerks in charge of terminals, tours, or crews consisting of twenty or more employees shall be of grade 6. When a terminal railway post office is operated in three tours

there shall be a relief clerk in charge: *Provided*, That the clerk in charge of terminals having seventy-five or more employees shall be of grade 7: *Provided further*, That no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this Act. [39 U. S. C. 618a.]

II

Postal Laws and Regulations of the United States of America, edition of 1932 (as amended):

SEC. 10.1. The Postmaster General assigns to his office: The superintendence and government of the department, and the appointment of the officers, clerks, and employees; * * * the determination of appeals from the action of the several Assistant Postmasters General; the promulgation of rules and regulations; * * *

SEC. 12.1. To the Second Assistant Postmaster General are assigned the authorization and management of the transportation of the domestic and international mails by means of railroads. * * * the authorization of payment of salaries to railway postal clerks * * *; the supervision of the Railway Mail Service, * * * and the general supervision of the divisions of the Bureau. * * *

SEC. 12. 4. The Division of Railway Mail Service, under the supervision of the general superintendent, is charged with the preparation of all regulations for the government of the Railway Mail Service, and of cases for the appointment, removal, transfer, promotion, and reduction of all officers of the service and railway postal clerks; * * *

SEC. 2012. 1. Original appointments to the position of railway postal clerk shall be made by the Postmaster General under the civil-service rules and regulations.

SEC. 2015. 1. Assignments of railway postal clerks to duty upon lines and in offices shall be made by the General Superintendent.

No. 7546.
SPECIAL CALENDAR.

IN THE
United States Court of Appeals for the
District of Columbia

OCTOBER TERM, 1939.

JAMES A. FARLEY, Postmaster General of the
United States,
APPELLANT.

v.

EDWIN H. ABBETMEIER, FRANK A. ABEL,
et al.,
APPELLEES.

APPELLEES' BRIEF.

FRED B. RHODES,
COOPER B. RHODES,
ROBERT F. KLEPINGER,
Attorneys for Appellees.

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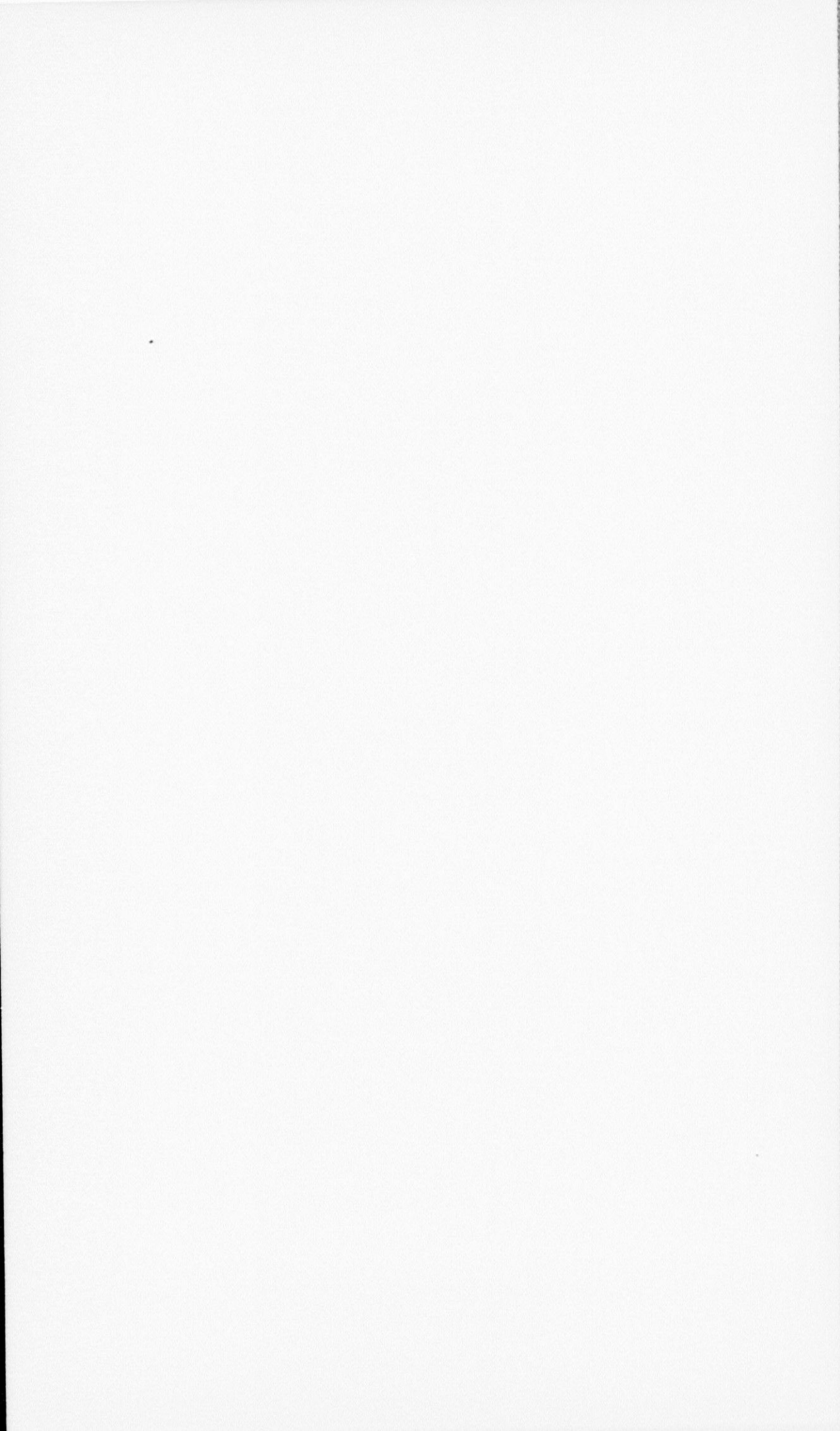
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BRIEF FOR APPELLEES.

Statement of the Case.

The basic cause of this litigation is the interpretation by administrative officials of the Post Office Department of an Act of Congress which has been referred to as the Terminal Reclassification Act, and action taken by such officials pursuant to that interpretation. That Act was approved June 14, 1934 (48 Stat. 962, 39 U. S. C. 618 a), at which time the appellees were employed as Railway Postal Clerks in terminal offices

which had been designated as Class B offices, and had attained the status of Grade 5 clerks, pursuant to the Act of February 28, 1925 (43 Stat. 1062, 1063, 39 U. S. C. 610, 611, 618), and were receiving salary at the rate of \$2,450.00 per annum, as provided by that statute.¹

The so-called Terminal Reclassification Act limited future promotions of clerks in terminal offices to Grade 4, but the following provision of that Act was intended to protect those clerks who had previously been promoted to Grade 5:

“PROVIDED FURTHER, That no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this Act.”

Certain officials of the Post Office Department, in charge of the affairs of the Railway Mail Service, thereafter announced that the enactment of the Terminal Reclassification Act made it necessary for that Department to remove all Grade 5 clerks from the terminal offices or reduce them in grade and salary. Those officials have repeatedly taken the position that the Terminal Reclassification Act prevented the employment of a Grade 5 clerk in terminal offices.

Pursuant to that announced policy, the Post Office Department took action which ultimately resulted in the reduction to Grade 4 of most of the Grade 5 clerks employed in terminal offices at the time of the enactment of the Terminal Reclassification Act. The methods by which the Department accomplished this objective are not yet of record in this case but will be shown by the evidence which the appellees are prepared to pre-

1. The statutes here referred to are set forth in full in appellant's brief at pages 32-33.

sent to the trial court at the final hearing of this cause and which has heretofore been presented to the court below in previous litigation which will be hereinafter mentioned.

With a few exceptions, the appellees are now classified as Grade 4 clerks and are receiving salary at the rate of \$2,300.00 per annum. The exceptions noted are the cases of those clerks who have left the service by retirement or otherwise, and those clerks who have since been transferred to other assignments and are now classified as Grade 5 or Grade 6 clerks and are being paid accordingly. Some of these changes, as the record shows, have occurred since the filing of this suit.

The appellees seek, by this suit, an order compelling the Postmaster General to restore them to Grade 5 as of and from the dates of their respective reductions in grade, and to correct the records of the Post Office Department accordingly.

Some knowledge of the factual and legal background of this case may be gained from a reading of the decision of this court in the case of *Farley v. Welch*, 67 App. D. C. 382, 92 F. 2d 533.

Questions Involved.

As viewed by counsel for the appellees, the questions presented for determination on this appeal are:

1. Whether the Terminal Reclassification Act required or authorized the Postmaster General, acting

through his subordinate officials, to reduce the appellees in grade and salary.

2. Whether the Postmaster General had authority, under any statutory provision, to reduce the appellees in grade and salary without their consent.

3. Whether the Postmaster General had authority, under any statutory provision, to reduce the appellees in grade and salary with or without their consent.

4. Whether the appellees are pursuing the proper remedy to correct the wrong of which they complain.

5. Whether the appellees are guilty of laches.

Summary of Argument.

I. The Terminal Reclassification Act did not authorize or require the Post Office Department to reduce the grade and salary of appellees, but was intended to protect their status as it existed prior to the enactment of that legislation.

II. The appellees are not guilty of laches.

III. The Postmaster General had no authority to reduce the appellees in grade and salary, with or without their consent.

IV. This case has not become moot as to those appellees who are no longer employed as Grade 4 clerks in terminal railway post offices.

V. The District Court has jurisdiction of this suit and of the claims asserted by the appellees.

VI. No administrative remedy is available to appellees.

VII. This case involves a substantial issue of fact and is therefore not subject to dismissal under Rule 56 of the Rules of Civil Procedure for the District Courts of the United States.

VIII. The record shows that the appellees were, in fact, reduced in grade and salary as a result of the enactment of the Terminal Reclassification Act, and in violation of its provisions.

ARGUMENT.

I.

The Terminal Reclassification Act did not authorize or require the Post Office Department to reduce the grade and salary of appellees, but was intended to protect their status as it existed prior to the enactment of that legislation.

We think it will be conceded by counsel for appellant that the Terminal Reclassification Act did not, by its terms, impose upon any official of the Post Office Department any duty or obligation to disturb the status of the Grade 5 clerks who were, on June 14, 1934, employed in the terminal railway post offices. Nevertheless, the answer and affidavits which have been filed on behalf of the appellant in the court below indicate

clearly that the Postmaster General, and his subordinate officials, considered that this statute imposed such a duty, notwithstanding the fact that the terms of the statute clearly indicate that it was intended to affect only those terminal clerks who had not yet advanced to Grade 5.

In contending that the Terminal Reclassification Act imposed upon officials of the Post Office Department a duty or obligation to transfer or reduce all terminal clerks who had theretofore attained Grade 5, the appellant points (R. 19-22) to Senate Report No. 1162, 73rd Congress, 2nd Session. That report on this legislation, when it was pending before the Senate, indicated (R. 19) that it was the intention of the Post Office Department to eventually transfer to other positions those Grade 5 clerks who were then employed in the terminal offices. However, the statute, as enacted by the Congress, made no provision for such transfers and included no language which could be construed as imposing on the Postmaster General any legal duty to transfer those Grade 5 clerks to other assignments. The Act did not disturb the power already vested in the Postmaster General, subject to certain limitations, to transfer clerks from one assignment to another; but to protect these appellees, and other clerks similarly situated, Congress stipulated in the Act that no clerk should suffer loss of rank or salary as a result of its enactment. (39 U. S. C. 618 a.)

To emphasize the fact that the Postmaster General and his subordinate officials have erroneously construed and applied the Terminal Reclassification Act, in taking the position that that statute prevented the

employment of Grade 5 clerks in the terminal railway post offices, we point to the case of *Welch v. Farley*, 18 F. Supp., 75; Aff. 67 App. D. C. 382, 92 F. 2d 533. In that case, the court below ordered the Postmaster General to promote the plaintiff to Grade 5 while he was a clerk employed in one of the terminal offices. If the position taken by the Postmaster General with respect to these appellees, and his construction and application of the Terminal Reclassification Act, were correct, the court deciding the *Welch* case would not have had the power and authority to take the action it did.

The appellees do not contest, in this litigation, the right of the Postmaster General to transfer clerks from one assignment to another, subject to such rules and regulations as have been established for the Railway Mail Service. In the cases of these appellees, however, it is noted that the Postmaster General did not exercise his authority of transfer. He did not even offer them positions in other assignments to which they might have been transferred. They were told, in effect, that they must apply for transfers to other assignments, and that they would be reduced in grade if they failed to so apply. It was not possible for the Post Office Department to transfer to other assignments all of the Grade 5 clerks employed in terminal offices at the time of the enactment of the Terminal Reclassification Act, for there were not enough vacancies available. Referring specifically to the affidavit of Charles A. Dietz, which is attached to the motion for summary judgment (R. 25), it will be noted that this affidavit includes a rather elaborate chart, or table, containing information taken from the records of the Post Office Department (R. 28-32). That table is misleading and

fails to present a true picture of the situation which confronted the Post Office Department and the Grade 5 clerks who were affected by the Department's erroneous application of the Terminal Reclassification Act, in that the figures shown in columns #2 and #4 do not include the total number of clerks affected but only such of them as happened to be plaintiffs in this proceeding.

The pending suit does not present any questions of fact or law which have not been the subject of prior litigation. Prior to the filing of this suit, the court below had heard and entered judgments in five similar suits, referred to in the complaint (R. 9). It is practically admitted by the answer of the appellant (R. 18) that the claims of the appellees herein are similar in law and fact to those of the five clerks whose suits below resulted in judgments granting to them precisely the same relief sought by the appellees in the pending action.

In the five previous suits, the trial court made findings of fact and stated conclusions of law which comprise the only previous judicial determination of the questions of fact and law which are again in issue in this suit. A copy of the Findings of Fact and Conclusions of Law filed by the court below in one of those five previous suits is set forth in the Appendix. We do not contend that the legal conclusions stated by the court below in that suit are binding upon this court on this appeal, but we do feel that they are entitled to serious consideration by this court in view of the fact that no appeal was taken from those previous decisions of the court below, which were rendered after a full hearing on the merits.

II.

The appellees are not guilty of laches.

In this case, the time which elapsed after the right of action accrued in individual cases, up to the date this suit was filed, varies from one year to three and one-half years. Under some circumstances, such delay would constitute laches and the claims of the appellees would be barred. However, it is a well-established principle of law that mere lapse of time does not give rise to a defense of laches. This principle is stated in 10 R. C. L. 396, as follows:

“Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another.”

The appellant in this case has not shown, and certainly the complaint does not show, that the appellant or the Government has been prejudiced by such delay as has occurred in this case. Only by a most adroit recitation of facts (R. 27-32), contained in an affidavit of an official of the Railway Mail Service, are counsel for the appellant able to draw an inference that the Government *may* have been prejudiced by the delay. To support that inference, recourse must be had to conjecture as to what might possibly have transpired, in the transfer and assignment of employees of the Railway Mail Service, if the appellees had not been unlawfully reduced in grade or if they had sooner filed this suit.

In support of their contention that the right of action of the appellees is barred by the principle of laches, counsel for the appellant, in their brief at pages 15-18, have cited several cases in which suits were filed by dis-

charged Government employees, and in which the courts dismissed the suits on the ground of laches. Typical of those cases is that of *Cromwell v. Doyle*, 69 App. D. C. 215, 99 F. 2d 448, in which this court held:

“When a public official is unlawfully removed from office * * * obvious considerations of public policy make it of first importance that he should promptly assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.”

Obviously, such authorities as that case have no application here. These appellees were not discharged. They have continued to perform the duties of their respective offices. It is admitted by the answer of the appellant (R. 11) that these appellees, after their reduction to Grade 4, continued to perform the same duties which they had performed as Grade 5 clerks. If it be true, and in the consideration of this question it must be assumed to be true, that there was no authority in law for the reduction of these clerks to Grade 4 and that no provision of the law prevented the Postmaster General from allowing these clerks to remain in the terminal offices at Grade 5 until they should retire, resign, or die, then it cannot be said that the Government has been prejudiced by the fact that these appellees delayed the filing of their suit until after the determination by the court below of the suits below by their five fellow employees. The facts shown by the record in this case cannot be stretched so as to reach any different conclusion.

On the question of laches, the case of *U. S. ex rel. Welch v. Farley*, 18 F. Supp., 75; Aff. 67 App. D. C. 382, 92 F. 2d 533, is again in point. In that case, the

petitioner had not been reduced in grade, but complained that, due to an unlawful application of the Terminal Reclassification Act (39 U. S. C. 618 a), his promotion to grade 5 had been unlawfully withheld from him. He contended, and the court held, that he became entitled to be classified in Grade 5 on July 1, 1933. His suit was filed on October 21, 1936, more than three years after his cause of action first accrued. Notwithstanding that delay, the court ordered the Postmaster General to promote Welch to Grade 5 as of, and from, July 1, 1933. It is significant to point out that, following the decision of this court in the *Welch* case, the Post Office Department, by administrative action, granted retroactive promotions to several hundred clerks whose cases were similar to that of Welch, and caused each of them to be paid the salary which had been improperly withheld from them for a period of more than three years.

III.

The Postmaster General had no authority to reduce the appellees in grade and salary, with or without their consent.

It has become well settled that where Congress has by law established and specified a certain salary for a certain position in the Government service, no Government official may reduce that salary, nor may the employee and the appointing authority effectively stipulate that it shall be so reduced. The law under which these clerks were originally promoted to Grade 5 did not make their promotion a matter of discretion on the part of officials of the Post Office Department, but

made such promotion mandatory and automatic, conditioned only upon satisfactory performance of duty. Congress, in its wisdom, had decided that such clerks, who had performed satisfactory service for a certain period of years, should be classified in Grade 5 and should be paid \$2,450.00 per year. As shown by the authorities cited below, the Postmaster General had no authority, with or without the consent of the appellees, to reduce the salaries of the appellees.

The principle stated above has been upheld in many cases, including the following:

Glavey v. U. S., 182 U. S. 595, 21 S. Ct. 891.

Miller v. U. S., 103 F. 413.

Geddes v. U. S., 38 C. Cls. 428.

Hartman v. U. S., 40 C. Cls. 133.

Dyer v. U. S., 20 C. Cls. 166.

Adams v. U. S., 20 C. Cls. 115.

In the case of *Miller v. U. S.*, *supra*, which is cited with approval by the Supreme Court in the *Glavey* case, *supra*, the court said (p. 415):

“Any bargain whereby, in advance of his appointment to an office with a salary fixed by legislative authority, the appointee attempts to agree with the individual making the appointment that he will waive all salary or accept something less than the statutory sum, is contrary to public policy, and should not be tolerated by the courts. * * * (p. 416). And, if public policy prohibit such a bargain in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel.”

It should be made clear that the appellees do not admit that they voluntarily entered into any bargain

whereby they consented to accept salary in an amount less than that to which they were entitled under the law. They contend, and allege in their complaint, that their reductions in grade and salary were effected without their consent. However, in view of the authorities cited above, it can be said that, even if the appellees had consented to a reduction in grade and salary, their consents would be a nullity and would not have conferred upon the appellant the right to order them so reduced. The appellant contends, in his answer and in his brief, that certain of the appellees made a bargain, with him or his subordinate officials, whereby they agreed to a reduction in grade and salary to a level below that to which they were rightfully entitled under the law, in return for which, according to the appellant's version of the facts, he agreed to refrain from transferring them to other assignments. Bearing in mind the fact that these appellees could, under the law, have been allowed to remain undisturbed in their status as Grade 5 terminal clerks, and that the threat of transfer, under which the appellant says he obtained the "consents," was one which the law did not require the appellant to make, it can readily be seen that the "bargains" upon which the appellant sees fit to rely in this litigation are contrary to public policy and bring this case within the rule laid down by the authorities cited above.

IV.

This case has not become moot as to those appellees who are no longer employed as Grade 4 clerks in terminal railway post office.

Counsel for the appellant have pointed out the fact that several of the appellees are no longer employed

in the Railway Mail Service, and that a few of them have recently been promoted to Grade 5 or Grade 6. It is contended on behalf of the appellant that such appellees are not entitled to any relief in this action. On behalf of such appellees, we respectfully submit that if they, like the other appellees in this action, had a cause of action when they were unlawfully reduced in grade and salary, such cause of action was not destroyed by their subsequent separation from the service or promotion. In each of these instances, there was a period during which each of these appellees was entitled to be classified and paid as a Grade 5 clerk but was actually classified and paid as a Grade 4 clerk. They seek an order commanding the Postmaster General to change their classification, and the appropriate records, for the period in question. Surely, in the cases of those individuals who have been subsequently promoted to Grade 5 or Grade 6 (some of them since the filing of this suit), it cannot be seriously contended that the Post Office Department, by ordering such promotions, can deprive the appellees of the right to have their grievances heard by this court.

As to these appellees this suit is not, as contended by counsel for the appellant, merely a suit for the recovery of money. They ask only that the appellant be required to rescind the action by which he ordered them reduced in grade. After their grievances have been remedied by that action, they will have no difficulty in obtaining payment of the money which is due them, by appropriate action in the General Accounting Office. They do not, and we concede that they could not, ask the court below to order the Postmaster General to pay them the salary which has been withheld

from them as a result of their unlawful reduction in grade. Furthermore, until the Postmaster General, as a result of this litigation or voluntary action on his part, has corrected the records of his Department so as to show and carry these appellees as Grade 5 clerks for the periods in question, this group of appellees could not successfully maintain actions in the Court of Claims for the recovery of the salary which is due them. *Morey v. U. S.*, 35 C. Cls. 603, 605.

It follows, therefore, that these appellees, whose status has been changed since their cause of action first accrued, by promotion, resignation, or retirement, are pursuing the proper remedy and the only remedy which is available to them.

V.

The District Court has jurisdiction of this suit and of the claims asserted by the appellees.

Although the writ of mandamus, as such, has been abolished, the relief formerly obtainable by that writ is still available, and the substantial rights of the parties to this suit have not been altered by the adoption of the Rules of Civil Procedure for the District Courts of the United States. The case of *Welch v. Farley*, *supra*, is ample support for the contention of the appellees that the court below properly has jurisdiction of a case of this nature.

The statutes which are involved in this case, and the rights and duties imposed by them on the parties to this litigation, are clear and unambiguous. To bor-

row the language used by the late Mr. Justice Cox in his well-considered opinion in the *Welch* case, it may well be said that the statutes here involved "seem so plainly to describe the duties of the Postmaster General * * * as to be free from doubt and equivalent to a positive command."

VI.

No administrative remedy is available to appellees.

It is contended on behalf of the appellant that the jurisdiction of the court below cannot be properly invoked by the appellees because they have not exhausted administrative remedies available to them. Appellant's brief, however, is very vague in its reference to the administrative remedies which are available to the appellees in this instance.

In support of their contention on this subject, counsel for the appellant state that the appellees could and should have asked the Postmaster General to correct the wrong which had been done to them, before resorting to litigation.

It is apparent from the answer (R. 11) and the affidavit (R. 17-18) of the appellant that the reduction of the appellees in grade and salary was effected at his direction and under his supervision, although his counsel, in their brief at page 19, appear to place the blame for this action on the shoulders of the Second Assistant Postmaster General. It matters not which particular official of the Post Office Department was actually responsible for the policy which resulted in

the unlawful reduction of the appellees, for it is enough to know that the action was taken by virtue of authority which the appellant claims was vested in him by statute.

Under the circumstances it is hardly reasonable to contend that the appellees could expect to have their grievances remedied by an appeal to the official whose policies and orders caused those grievances. Furthermore, the answer and all of the affidavits filed on behalf of the appellant, show very clearly that the appellant is not, and has never been, willing to give to the appellees the relief which they seek by this litigation. It cannot be said, with fairness, that an administrative remedy was available to the appellees. *U. S. ex rel. Aetna Ins. Co. v. Auditors of Town of Brooklyn*, 8 F. 473; *U. S. ex rel. Masslich v. Saunders*, 124 F. 124.

But counsel for the appellant make the further contention that an additional means of obtaining relief through administrative action has been opened to the appellees by the answer of the appellant (R. 12) in which he states:

“* * * that it has been decided that if and when each or any of the plaintiffs herein (but within a reasonable time hereafter) submits to the Post Office Department a statement under oath to the effect that he or she did not freely, and without compulsion, choose to remain in the terminal at Grade 4 rather than be transferred to a Grade 5 vacancy out of the terminal, such plaintiff will be restored to Grade 5 without the necessity of further action upon his or her part and will be transferred to Grade 5 position out of the terminal as soon as a vacancy arises; *provided that any such restoration will not be intended or considered to*

*constitute a waiver of any defense which either the United States or this defendant may have as to any claim for compensation, in addition to that which the plaintiffs have received, for past services, including the defense stated as the Fifth Defense hereof; * * *.*" (Emphasis ours.)

It is apparent, from the above quoted portion of the appellant's answer, that he does not offer to give the appellees complete relief, as is inferred by his counsel in their brief. Surely, it cannot be said that the appellant, by now offering to give to the appellees only partial relief, after suit has been filed, can deprive the court below of its jurisdiction of this case and its power to give to the appellees the complete relief to which they are entitled.

On this question, however, counsel for the appellant contend, in their brief at pages 24 and 25, that the court below does not have power to order the Postmaster General to make retroactive restorations of the appellees to Grade 5. Calling attention to the fact that the authorities there cited by appellant's counsel are not applicable here, because the appellees are not discharged Government employees, we again cite the case of *Welch v. Farley, supra*. In the *Welch* case, as has been pointed out, the court ordered the plaintiff promoted to Grade 5 as of and from a date which preceded by more than three years the filing of his suit.

But we must assume that the appellant is acting in good faith in offering to restore most of the appellees to Grade 5, upon submission by them to him of mere individual affidavits stating that they did not voluntarily consent to be reduced to Grade 4, even though

he does not thereby offer to give them complete relief and we cannot contend that he makes that offer, in his answer, merely for the purpose of defeating this action. If the appellees are entitled to the relief which, according to the brief filed by his counsel, he is so willing to give to the appellees, why are they not entitled to the same *complete* relief which was granted to their five fellow employees by the court below in the previous suits (R. 9)? And if he be so willing to grant even partial relief to the appellees, how can his counsel now seriously contend that these appellees are without right or remedy in this suit?

VII.

This case involves a substantial issue of fact and is therefore not subject to dismissal under Rule 56 of the Rules of Civil Procedure.

Rule 56 (c), of the Rules of Civil Procedure for the District Courts of the United States, provides in part as follows:

“The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The rule itself is clear and specific enough, but it has been held, in a number of cases, that a motion for summary judgment cannot be granted if there is a “genuine issue as to a material fact,” and if it does not appear that a trial of the action “will be a useless

form." *Nickelson v. Nestles*, 107 F. 2d 17; *Ottinger v. General Motors*, 27 F. Supp. 508, 510; *Saunders v. Higgins*, 29 F. Supp. 326, 328; *Boerner v. United States*, 26 F. Supp. 769, 770.

It is admitted by counsel for the appellant, in their brief at page 8, that there is a material issue of fact in this case. The appellees contend, and allege in their complaint, that they never consented to be reduced from Grade 5 to Grade 4. This allegation of the appellees is denied by the appellant in his answer (R. 10-16), in which he stated, in effect, that the appellees consented to be reduced from Grade 5 to Grade 4 and that they willingly agreed to have their salaries correspondingly reduced. This, as appellant's counsel concede, is an issue of fact which has not yet been decided in this case; although the appellant, by offering to restore a majority of the appellees to Grade 5, practically concedes that the appellees' position is sound.

Under the provisions of Rules 7 (a) and 8 (d), of the Rules of Civil Procedure, all of the averments of the appellant's answer must, at this stage of the proceedings at least, be taken as denied or avoided. Under the provisions of Rule 56 (c), the court below could not hold that there was no material issue of fact, in the face of the allegations made in the appellees' complaint and the denial of those allegations by the appellant's answer and the affidavits which accompanied his motion for summary judgment.

It should be noted that the affidavits filed in support of the appellant's motion for summary judgment (R.

16-35) do not, for the most part, conform to the requirements of Rule 56 (e), which provides, in part, as follows:

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.”

VIII.

The record shows that the appellees were, in fact, reduced in grade and salary as a result of the enactment of the Terminal Reclassification Act, and in violation of its provisions.

Even if we should disregard the appellees' complaint and all of the facts alleged therein, and consider only the appellant's answer and all of the affidavits filed on his behalf in support of the motion for judgment, we can come to only one conclusion as to the origin of this controversy. It is clear that the Terminal Reclassification Act resulted in the reduction of the appellees in grade and salary. It will be conceded that, but for that legislation, the appellees would still be classified as Grade 5 clerks in the terminal railway post offices, and it is apparent that their reduction in grade violated the provisions of that statute, which stated:

“That no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this Act.”

Conclusion.

In view of the entire record presented on this appeal, we respectfully submit that the action of the court below, in refusing to grant the appellant's motion for summary judgment, was proper and should be affirmed.

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COOPER B. RHODES,
ROBERT F. KLEPINGER,
Attorneys for Appellees.

APPENDIX.

IN THE
DISTRICT COURT OF THE UNITED STATES.
FOR THE DISTRICT OF COLUMBIA.

UNITED STATES, on Relation
of LOUIS A. RICCI,
Plaintiff,

vs.

JAMES A. FARLEY, Postmas-
ter General of the United
States,
Defendant.

At Law No. 89858.

Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

This cause having come on for final hearing at this Term, on issues made by the pleadings filed herein by the parties to this cause, the Court, after hearing the evidence adduced by the respective parties hereto, makes the following findings of fact:

1. That the plaintiff, Louis A. Ricci, is a citizen of the United States and a resident of the State of New York.

2. That the defendant, James A. Farley, is a citizen of the United States residing in the District of Colum-

bia and is sued as Postmaster General of the United States.

3. That the plaintiff is, and for many years prior hereto has been, an employee of the United States in the Railway Mail Service, having been appointed to the position of Railway Postal Clerk in July, 1918; that subsequent to his said appointment, and in accordance with the statutes regulating the appointment and advancement of railway postal clerks (Act of February 28, 1925, 43 Stat. 1062), plaintiff progressed in rank and salary until, on or about January 1, 1925, he was promoted to Grade 5, and his salary fixed at Two Thousand four hundred fifty dollars (\$2450.00) per annum, pursuant to the provisions of said statutes, he having theretofore performed a total satisfactory service of Three hundred six (306) days in the next lower grade; that plaintiff was then, since that date has been, and now is, employed in the West Side Terminal Railway Post Office, New York, New York, which office was, prior to June 14, 1934, known and designated as a Class B Terminal.

4. That, having been promoted to Grade 5, as aforesaid, plaintiff continued to render satisfactory service as a Railway Postal Clerk and received salary, in accordance with the applicable provisions of law, at the rate of Two thousand four hundred fifty dollars (\$2450.00) per annum, from July 1, 1925 until October 31, 1935.

5. That on or about November 1, 1935 the defendant did, through his subordinate officers and agents, cause the plaintiff to be demoted and reduced to Grade 4, and the plaintiff has, since November 1, 1935, been

classified on the records of the Post Office Department as a Grade 4 Railway Postal Clerk and has, since that date, received salary at the rate of Two thousand three hundred dollars (\$2,300.00) per annum; that the plaintiff has, since his said reduction, been required to perform the same work and duties, pursue the same studies, and meet the same requirements and conditions, as were required of him prior to November 1, 1935, when he was classified as a Grade 5 Railway Postal Clerk.

6. That, prior to November 1, 1935, and prior to his said reduction in grade, plaintiff was, by his superior officers in the Railway Mail Service, offered an opportunity to apply for transfer to duty at the office of the Railway Mail Service located at the Air Mail Field, Newark, New Jersey, and plaintiff was informed by his said superior officers that he could retain his rating and classification as a Grade 5 clerk by applying for and accepting a transfer to duty at said Air Mail Field; that under the rules and regulations promulgated by the Post Office Department, then in force and effect, plaintiff could not have accepted said transfer, or change of assignment, without suffering loss of rank, contrary to the provisions of the Act of Congress approved June 14, 1934 (48 Stat. 962). and plaintiff therefore declined to apply for such transfer; that plaintiff was informed by his superior officers in the Railway Mail Service that his reduction in grade was caused by his failure to apply for transfer to said Air Mail Field; that the rank of a Railway Postal Clerk is determined by his salary grade, his service seniority (which is determined by his length of service in the Railway Mail Service), and his line

seniority (determined by his length of service in a particular place or office); that the line seniority of a Railway Postal Clerk is an important factor in the promotion of clerks to supervisory positions within a particular office, and is the determining factor in the choice or assignment of working hours and duty assignments; that if plaintiff had applied for, and accepted, a transfer to duty at said Air Mail Field, he would have suffered the loss of the high rank and line seniority which he had acquired by his service of seventeen (17) years in the West Side Terminal Railway Post Office, in New York City.

7. That the plaintiff did not consent to be reduced in grade, and said reduction in grade was not in any way voluntary on his part; that the plaintiff has always rendered satisfactory service as a Railway Postal Clerk, and his said reduction in grade was not caused or occasioned by any misconduct or fault of the plaintiff.

8. That the allegations of the petition, filed herein by plaintiff, have been proved substantially as alleged.

CONCLUSIONS OF LAW.

Based upon the foregoing findings of fact, the Court states its conclusions of law as follows:

1. The Act of Congress approved June 14, 1934 (48 Stat. 962; U. S. Code, Title 39, sec. 618a) does not permit the reduction, in rank or salary grade, of Railway Postal clerks employed in terminal railway post offices, who had become entitled to promotion to Grade

5 prior to June 14, 1934; that said Act of Congress was not intended to affect the positions or salary grades of such Railway Postal clerks; that said Act of Congress did not require the Postmaster General of the United States, or his subordinate officials, to transfer such clerks out of the terminal railway post offices or reduce them in rank or salary grade.

2. That the reduction of the plaintiff from Grade 5 to Grade 4, on or about November 1, 1935, was unlawful and contrary to the provisions of said Act of Congress approved June 14, 1934.

3. That said reduction in grade has, since November 1, 1935, deprived the plaintiff of salary to which he is entitled according to law.

4. That the plaintiff is entitled to be restored to the status of a Grade 5 Railway Postal clerk, as of and from November 1, 1935.

5. That the prayers of the plaintiff's petition should be granted.

DANIEL W. O'DONOGHUE,
Justice.

No. 7546—Special Calendar

**In the United States Court of Appeals for the
District of Columbia**

OCTOBER TERM, 1939

**JAMES A. FARLEY, POSTMASTER GENERAL OF THE UNITED
STATES, APPELLANT**

v.

EDWIN H. ABBETMEIER, FRANK A. ABEL, ET AL., APPELLEES

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

APPELLANT'S REPLY BRIEF

RECORD INDEX BY PLAINTIFFS

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United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1939

No. 7546—SPECIAL CALENDAR

JAMES A. FARLEY, POSTMASTER GENERAL OF THE UNITED
STATES, APPELLANT

v.

EDWIN H. ABBETMEIER, FRANK A. ABEL, ET AL., APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

APPELLANT'S REPLY BRIEF

I

Appellees' contention as to involuntary reductions

It is conceded that the Post Office Department was not authorized by the Terminal Reclassification Act of June 14, 1934, c. 522, 48 Stat. 962 (39 U. S. C. 618a), to reduce any clerk in grade or salary without his consent, therefore it is not necessary to discuss the statements in the appellees' brief (pp. 3-5) upon that subject.

It is submitted that it is immaterial whether or not the instructions to transfer Grade 5 clerks from the terminals (R. 34-35) were *required* by the Act. They were issued

pursuant to an administrative plan clearly authorized by law (see R. 17) and, in effect, approved by the Congress (see R. 19). This subject will be touched upon again in connection with subsequent points.

The appellees' statement (at p. 7) that the plaintiffs were told, in effect, that they must apply for transfers or be reduced, is entirely *de hors* the record, and even if it were true, it is clear that such action was not authorized by the appellant (see R. 17-18, 34-35). See pp. 7-8 and 18 of our prior brief.

Farley v. Welch

Throughout their brief the appellees rely upon the case of *Farley v. Welch*, 67 App. D. C. 382, 92 F. 2d 533. However, not one of the questions in the instant case was either presented in the arguments and pleadings or decided by the Court in that case, nor is the reasoning of the Court in any way inconsistent with the appellant's position.

So far as disclosed by the record in the *Welch* case (No. 6948, October Term, 1936) the claim of the plaintiff might have been prosecuted diligently through administrative channels from the time the right arose until the administrative decision complained of was finally made by the Postmaster General. The record does not show the exact period of time which elapsed between the decision and the filing of the petition, but the dates shown do not suggest that an unreasonable delay occurred. Fundamentally the case was not a back-salary suit, and plainly the present question of statutory construction was not before the Court. Indeed the reasoning of the opinion is favorable to the appellant's arguments.

However, if it be assumed that any such question could have been raised in the *Welch* case, it is clear that "Questions which lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents" (*Webster v. Fall*, 266 U. S. 507, 511).

Ricci v. Farley

The appellees appear to state (p. 8) that the five previous cases decided by the District Court involved the questions presented for decision on this appeal. However, examination

of the findings and conclusions in the case of *Ricci v. Farley* set forth in the Appendix to the appellees' brief will disclose that none of the questions were expressly passed upon therein. The fact is that the only defense involved in the instant appeal which was raised in the *Welch* case is the defense of laches, and as to that, no showing that the delay operated to the Government's financial detriment was made. The Court found that the plaintiff had been reduced without his consent (Fdg. 7, p. 26), hence the Court had no reason to, nor did it, pass upon the appellees' contention that voluntary reclassifications were not permissible under the Act.

However, in finding No. 6 (p. 25) the District Court appears to have reached the conclusion that a clerk's "rank" under the Act includes his so-called seniority standing. While it has not been suggested either in the pleadings or the arguments that this finding is relevant to the instant case, since it has been brought to the Court's attention we feel that we should make available to the Court a statement of the appellant's views as to that question. Such statement is set forth in the Appendix, commencing at p. 17, *infra*.

II

The contention that appellees are not guilty of laches

It is submitted that the distinction which the appellees (at pp. 9-10) seek to draw between the cases cited in appellant's brief (pp. 14-18) and the present case is not sound in principle. The administrative order (R. 34-35) that all Grade 5 clerks be transferred from the terminals had received the prior approval of the Congress (see R. 19) and an argument that it need not have been issued is of no greater force than would be an argument that the Congress need not have enacted legislation. Obviously valid administrative actions are entitled to as much respect in this connection as legislative enactments, and plainly the delay is equally detrimental to the Government. The Government was as much prejudiced by the plaintiff's delay whether the order was permissive or whether required by the statute.

Also, the appellees are plainly wrong in stating (pp. 7-8) that the table in the Dietz affidavit (R. 27-32) is misleading

because columns #2 and #4 include only the plaintiffs and do not include other clerks who were reclassified to Grade 4. Even if it be assumed that none of the clerks could lawfully have elected to remain in the terminals at Grade 4, the information given in column #6 of the same table shows that all the clerks who were reclassified prior to the *Welch* case could have been transferred by September 1936, and that the last of the *Welch* case group could have been transferred in April 1938. Therefore, even if the appellees' interpretation of the Act should be held to be correct, it is plain that their delay will have occasioned financial detriment to the United States if they should succeed in obtaining the relief which they demand.

Moreover, while the fact that the financial detriment is demonstrable "renders the application of the doctrine of laches . . . peculiarly appropriate" (*Arant v. Lane*, 249 U. S. 367, 372), the "unreasonable delay in bringing the action" is "of itself sufficient to justify refusing the writ" (*Caswell v. Morgenthau*, 69 App. D. C. 17, 98 F. 2d 296, 298).

III

The contention that no administrative remedy is available

At page 16 of appellees' brief it is suggested that the appellant's brief "is very vague in its reference to the administrative remedies which are available to the appellees." It is difficult to understand what is meant by this statement unless it means that there is no indication of the procedural steps required to be taken by the clerks in order to bring their grievances to the attention of the Postmaster General. As to this, the departmental regulations prescribe no technicalities of procedure in connection with administrative appeals and the Court may correctly assume that there are none. However, to reassure the Court and counsel upon this point we include in the Appendix (p. 20, *infra*) a copy of a letter from the Postmaster General upon that subject.

It is contended, in effect (appellees' brief, pp. 17-18), that the fact that the appellant has set up administrative machin-

ery whereby the majority of the appellees, by furnishing the Post Office Department with—

a statement under oath to the effect that he or she did not freely and without compulsion elect to remain in the terminal at Grade 4 rather than be transferred to a Grade 5 vacancy out of the terminal, will be restored to Grade 5 *with the same force and effect as if he or she had never been reclassified in Grade 4, with the exception that such restoration will not be intended or considered to constitute a waiver of any defense which the United States would otherwise have as to any claim for compensation in addition to that which the plaintiffs will have received for services performed by them prior to the beginning of the quarter in which such restoration is made (R. 18) [italics supplied]*—

discloses a disposition on the part of the appellant which would render the taking of an administrative appeal a futile proceeding. It is further contended that such restoration is not the complete relief to which the appellees are entitled, although it is expressly conceded (brief, pp. 14-15) that the District Court is without jurisdiction to order the payment of back salaries. The contention seems to be, therefore, that the Postmaster General is under a ministerial duty to take action which would have the effect of waiving the Government's defenses to their back-salary claims; that it is evident that he is not disposed to do so; and, therefore, it would be futile to seek administrative relief.

Of course the reason for the limitation is clear. The appellant has concluded that if the plaintiffs were in fact coerced in the matter of their election to remain in the terminals at Grade 4, it is in the interest of justice and sound administrative policy to restore them to Grade 5. However, as the Supreme Court has said, payments of money on back salary which would duplicate payments already made to others because of the plaintiffs' tardy assertion of their claims, would not be in the interest of justice or of sound public policy. Therefore, the restoration of any such clerk will be made pursuant to Section 11 of the Act of February 28, 1925, c. 368,

43 Stat. 1053 (39 U. S. C. 627; appellant's prior brief, p. 33), "with the same force and effect as if he or she had never been reclassified in Grade 4" (R. 18) excepting only the Government's defenses to a back-salary claim.

However, if any of the plaintiffs does have a valid excuse for the delay in his case, and if it is the duty of the Postmaster General to take any different action therein, nothing which has been done or said has deprived such clerk of his right to an appeal to that officer and it is not to be assumed that the appellant would reach an erroneous decision in such case.

Thus the argument for the appellees comes to the proposition that they are entitled to retroactive restoration of salary even if they voluntarily elected to remain in the terminals at Grade 4 and even if there is no valid excuse for their long delay in asserting their claims. It is submitted that the public interest in orderly administration requires Government employees to take the comparatively simple step of requesting department heads to grant desired administrative relief before the courts are called upon to compel them to do so.

IV

The contention that the case is not moot

At page 13 of the appellees' brief it is argued that the case is not moot as to clerks who are no longer attached to terminals at Grade 4. The contention seems to be that the Court should order retroactive restoration even though its only effect would be to adjudicate a back-salary claim against the United States. This contention is sufficiently answered at pages 22-25 of appellant's brief.

It is further argued (p. 14) that the appellant should be "required to rescind action by which *he ordered* them reduced in grade." Aside from the fact that there is no such prayer in the complaint (see R. 10), it is clear that the appellant has never issued such an order (see R. 17-18, 34-35).

It is further contended (p. 15) that until the appellant has corrected his records to show the appellees as Grade 5 clerks for the periods in question, they are without remedy in the Court of Claims and *Morey v. United States*, 35 C. Cls. 603,

is cited for that proposition. However, that case merely holds that one who has not yet been promoted to a higher office cannot sue for its emoluments. The theory of the present plaintiffs is, and must be, that it is the appellant's ministerial duty to make the book corrections mentioned because, as a matter of law, they are and have been Grade 5 clerks from the dates of their original promotions to that Grade. Cf. *Farley v. Welch*, 67 App. D. C. 382, 92 F. 2d 533, 537. If that theory were correct, each of the cases cited at page 12 of appellees' brief would be authority for the proposition that no new appointment or book correction would be required in order to maintain a salary suit. It is not to be assumed that the Court of Claims would be less likely than this Court to agree with the plaintiffs' theory.

V

The contention that voluntary reclassifications were prohibited by law

It was pointed out in appellant's original brief (p. 27-28) that the decisions in the cases¹ cited in appellees' brief (p. 12) were controlled by the clearly expressed intention of the Congress that the plaintiffs therein should not be paid more or less than the amount of salary prescribed for their offices, and that nothing contained in the statutes involved in the present case indicates that the Congress intended to deprive the clerks of their well established right to elect reclassification to lower grades in these and similar circumstances. The reply to this argument (appellees' brief, p. 13) seems to suggest that the prior administrative practice should not be deemed to apply under the 1934 Act because that Act did not expressly require the transfer of Grade 5 clerks from the reclassified terminals. However, it is likewise true that the provisions of the 1925 Act, set forth in the Appendix of appellant's previous brief at pages 32-33, did not expressly require the transfer of Grade 5 clerks from offices reclassified from

¹ *Glavey v. United States*, 182 U. S. 595; *Miller v. United States*, 103 Fed. 413; *Geddes v. United States*, 38 C. Cls. 428; *Hartman v. United States*, 40 C. Cls. 133; *Dyer v. United States*, 20 C. Cls. 166; *Adams v. United States*, 20 C. Cls. 115.

Class B to Class A. Thus from the standpoint of the prior administrative practice (see R. 32-33) the statutes are indistinguishable in that respect.

The appellees' contention (p. 21), that the 1934 Act actually resulted in the reduction of the appellees, of course begs the question of whether the words "no employee . . . shall be reduced" were intended to prohibit the clerks from voluntarily electing reclassification. (See appellant's brief, p. 28.)

VI

The contention that the case is not subject to dismissal under Rule 56 of the Rules of Civil Procedure

The only issue of fact shown in the record relates to the question of coercion in respect of plaintiffs' elections to remain in the terminals at Grade 4, but this is not a material issue unless both the appellant and the appellees are mistaken in their contentions as to the law.

The appellees contend (p. 19) that, since there is an issue of fact in the case upon which the decision might conceivably turn, Rule 56 is inapplicable. However, it is plain that, if we are correct in contending either: that the plaintiffs are guilty of laches; or are without cause of action until resort is had to available administrative remedies; or that the case is not properly founded on the former mandamus jurisdiction; or if the appellees are correct in asserting that voluntary reclassifications were not permissible, the issue of coercion is immaterial because, no matter how it might be decided, it would not alter the outcome of the case. Obviously, if the Court agrees with any of these positions, the issue of coercion is immaterial within the meaning of Rule 56. As to the 27 plaintiffs covered by point IV of appellant's brief (p. 25) there is no substantial issue of coercion for the reasons there stated.

Plainly, the automatic operation of Rule 8 (d), in the face of uncontested affidavits, cannot have been intended to raise substantial issues of fact within the meaning of Rule 56, otherwise the latter rule would be meaningless.

The appellees' statement (pp. 20-21) that the appellant's affidavits do not comply with the rule fails to point out the

supposed defects. Moreover, it is noteworthy that the dismissal of the action as to plaintiff Young (R. 38) was based upon the facts set forth in the Hardy affidavit at R. 24.

CONCLUSION

Respectfully submitted.

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APPENDIX

A

RECORD INDEX BY PLAINTIFFS

The following tabular index is submitted for the convenience of the Court. It consists of the names of all plaintiffs appearing in the Record alphabetically arranged, indicating the facts in the cases of the individual plaintiffs which are not common to all of them.

1. The appellant's defenses that the plaintiffs are guilty of laches and that they have not resorted to available administrative remedies (points I and II, appellant's brief, pp. 14-22) apply to all of them.

2. The defense that the action is essentially nothing more than a back-salary suit outside the jurisdiction of the District Court (point III, id., pp. 22-25) applies to the plaintiffs indicated in columns 5 and 6 of the following index.

3. The defense that there is no substantial factual question but that at least 27 of the appellees were validly reclassified to Grade 4 upon their own voluntary requests (point IV, id., pp. 25-29) applies to those indicated in column 4.

Plaintiffs	Dis- missed (R. 38, 44)	Date of reclassifi- cation from Grade 5 to Grade 4	Clearly requested such re- classifi- cation (R. 22, 23-24)	Can obtain adminis- trative restora- tion (R. 12, 18)	Present status of plaintiffs who are not now in ter- minals at Grade 4
1	2	3	4	5	6
Edwin H. Abbetmeier (R. 1)		Oct. '35 (R. 29)		Yes	
Frank A. Abel (R. 1)		Oct. '35 (R. 30)		Yes	
Joseph W. Allen (R. 45)		Oct. '35 (R. 29)		Yes	
Edward G. Alpaugh (R. 45)		Apr. '35 (R. 28)		Yes	
Roy M. Ames (R. 45)		Dec. '35 (R. 31)		Yes	
Helena Andrews (R. 1)	Yes				
John H. Andrews (R. 1)	Yes				
Ward W. Andrews (R. 1)		Oct. '35 (R. 29)		Yes	
Raymond Apple (R. 1)		Oct. '35 (R. 29)			Grade 5 (R. 23).
Edward K. Arvidson (R. 1)		Oct. '35 (R. 29)		Yes	
Charles H. Asch (R. 1)	Yes				
Lewis E. Atkinson (R. 1)		July '35 (R. 28)		Yes	

Plaintiffs	Dis- missed (R. 38, 44)	Date of reclassi- fication from Grade 5 to Grade 4	Clearly requested such re- classifi- cation (R. 22, 23-24)	Can obtain adminis- trative restora- tion (R. 12, 18)	Present status of plaintiffs who are not now in ter- minals at Grade 4
1	2	3	4	5	6
Morris Bachman (R. 2)		Oct. '35 (R. 30)		Yes	
John R. Baer (R. 1)		Dec. '35 (R. 31)		Yes	
Alphus E. Baker (R. 45)		Oct. '35 (R. 29)			Grade 5 (R. 23).
David G. Barnes (R. 45)		Oct. '35 (R. 29)			Grade 5 (R. 23).
Charles W. Beane (R. 1)	Yes				
Charles E. Bell (R. 1)		Mar. '36 (R. 31)	Yes		
Frank Bertino, Jr. (R. 1)	Yes				
Ethel M. Bidwell (R. 1)	Yes				
Edmund Biedenkapp (R. 45)		Oct. '35 (R. 29)		Yes	
Frank G. Biggerstaff (R. 1)		Oct. '35 (R. 29)		Yes	
Charles S. Birely (R. 1)		May '35 (R. 28)		Yes	
Samuel Bischau (R. 1)		Nov. '35 (R. 30)		Yes	
Luther M. Blan (R. 1)	Yes				
Edward J. Bletzer (R. 1)		Nov. '35 (R. 30)		Yes	
Doris Blois (R. 1)		Oct. '35 (R. 30)		Yes	
Henry Blumenfeld (R. 45)		Nov. '35 (R. 30)			Laborer (R. 24).
A. Bonin (R. 1)	Yes				
Joseph Bovaird (R. 1)		Oct. '35 (R. 29)		Yes	
John H. Bowman (R. 1)		Oct. '35 (R. 29)	Yes		
Horace E. Boyd (R. 2)		Nov. '35 (R. 30)		Yes	
Oliver M. Bradshaw (R. 45)		Oct. '35 (R. 29)	Yes		Grade 5 (R. 23).
Jordan H. Brantley (R. 2)		Oct. '35 (R. 29)		Yes	
Charles E. Brassel (R. 2)		Aug. '37 (R. 32)		Yes	
Hugh J. Breslin (R. 2)	Yes				
Nettie P. Brietz (R. 2)	Yes				
Elmer A. Brooks, Jr. (R. 2)		Apr. '35 (R. 28)		Yes	
Branty R. Brown (R. 2)	Yes				
Jinx E. Brown (R. 2)		Oct. '35 (R. 30)		Yes	
John H. Brown (R. 2)		Oct. '35 (R. 30)			Grade 5 (R. 23).
Arthur C. Bruckman (R. 2)	Yes				
Edward A. Bruns (R. 2)	Yes				
Dorothy M. Brussow (R. 2)		Nov. '35 (R. 31)		Yes	
Julius A. Bryant (R. 45)		Nov. '35 (R. 30)		Yes	
Edward M. Bryner (R. 2)		Jan. '36 (R. 31)	Yes		
C. J. Burley (R. 2)		Dec. '35 (R. 31)			Grade 5 (R. 23).
William T. Butterworth (R. 2)		Oct. '35 (R. 30)		Yes	
Martin J. Byrne (R. 2)	Yes				
John P. Byron (R. 45)		Oct. '35 (R. 29)		Yes	
William F. Campbell (R. 2)		Nov. '35 (R. 30)		Yes	
Henry P. Canfield (R. 2)		Oct. '35 (R. 29)		Yes	
Huey Cannon (R. 2)		Oct. '35 (R. 29)		Yes	
Walter M. Cantrell (R. 2)		Oct. '35 (R. 29)		Yes	
Sylvester M. Caraway (R. 2)	Yes				
J. B. Cardwell (R. 2)	Yes				
Urbane S. Carney (R. 2)		Nov. '35 (R. 31)			Retired (R. 22).
John A. Carson (R. 2)		Oct. '35 (R. 29)			Grade 6. (R. 23).
John T. Chandler (R. 2)		Apr. '35 (R. 28)		Yes	
James O. Clark (R. 2)	Yes				
James M. Clayton (R. 2)		Oct. '35 (R. 29)			Grade 5 (R. 23).
Elton A. Cleaver (R. 2)		Oct. '35 (R. 30)		Yes	
George Cmar (R. 2)		Nov. '35 (R. 31)		Yes	
Alexander Cohen (R. 2)		Oct. '35 (R. 30)		Yes	
William F. Cole (R. 2)		Oct. '35 (R. 29)			Grade 5 (R. 23).

Plaintiffs	Dis- missed (R. 38, 44)	Date of reclassi- fication from Grade 5 to Grade 4	Clearly requested such re- classifi- cation (R. 22, 23-24)	Can obtain adminis- trative restora- tion (R. 12, 18)	Present status of plaintiffs who are not now in ter- minals at Grade 4
1	2	3	4	5	6
Walter E. Cobsentine (R. 2)	Yes				
Bernard G. Cotman (R. 2)		July '35 (R. 28)		Yes	
Lloyd S. Couch (R. 2)	Yes				
James J. Coughlin (R. 2)	Yes				
John J. Cox (R. 2)		Oct. '35 (R. 29)		Yes	
Claude T. Crotzenburg (R. 2)		Apr. '35 (R. 28)		Yes	
Roy W. Cudmore (R. 2)		May '35 (R. 28)			Grade 5 (R. 23).
De L. M. Cupp (R. 2)		June '35 (R. 28)			Grade 5 (R. 23).
Ralph F. Curry (R. 2)	Yes				
Samuel D'Aiello (R. 2)		Oct. '35 (R. 30)		Yes	
John B. Daniels (R. 2)		June '35 (R. 28)		Yes	
Clifford O. Darby (R. 2)		Oct. '35 (R. 29)		Yes	
Clement H. Davenport (R. 2)		Mar. '35 (R. 28)			Grade 5 (R. 23).
James C. Davis (R. 2)		Oct. '35 (R. 29)		Yes	
Martin Davis (R. 2)		Nov. '35 (R. 31)		Yes	
Oiga Davis (R. 3)		Oct. '35 (R. 29)		Yes	
Cuthbert C. Deane (R. 3)		Nov. '35 (R. 31)		Yes	
Louis DeGrazio (R. 3)	Yes				
George E. Deniton (R. 3)		Nov. '35 (R. 31)		Yes	
Douglas H. Des Verney (R. 3)		Oct. '35 (R. 30)		Yes	
Charles J. DeZort (R. 3)		Oct. '35 (R. 29)		Yes	
Michael Dillon (R. 3)	Yes				
Thomas W. Dixon (R. 3)		Nov. '35 (R. 31)		Yes	
Harold C. Doerr (R. 3)		Oct. '35 (R. 29)		Yes	
Edward H. Donnelly (R. 3)		Mar. '35 (R. 28)		Yes	
A. M. Doscher (R. 3)		Nov. '35 (R. 31)		Yes	
Edna G. Drayton (R. 3)		Oct. '35 (R. 30)		Yes	
Ernest F. Druillet (R. 3)		Oct. '35 (R. 29)		Yes	
Charles B. Durrah (R. 3)	Yes				
Ernest Edwards (R. 3)		Oct. '35 (R. 30)		Yes	
Dennis S. Farrell (R. 3)		Nov. '35 (R. 31)		Yes	
Louis A. Fedje (R. 3)		Oct. '35 (R. 30)		Yes	
Michael Fels (R. 3)		Oct. '35 (R. 29)		Yes	
Robert M. Ferguson (R. 3)		Dec. '35 (R. 31)		Yes	
John Fetchiet (R. 3)		Oct. '35 (R. 29)		Yes	
Joseph R. Finney (R. 3)		May '35 (R. 28)			Grade 5 (R. 23).
Peter L. Finnin (R. 3)	Yes				
Charles L. Flood (R. 3)		Oct. '35 (R. 30)		Yes	
Thomas D. Foil (R. 3)		Oct. '35 (R. 29)		Yes	
Donald B. Foltz (R. 3)	Yes				
Walter T. Frazier (R. 3)		Oct. '25 (R. 29)		Yes	
James M. French (R. 3)		June '35 (R. 28)			Dismissed (R. 22).
Willis R. Frill (R. 3)	Yes				
David Galane (R. 45)		Apr. '35 (R. 28)			Grade 5 (R. 23).
Henry L. Garbarino (R. 3)	Yes				
Clarence W. Garland (R. 3)		Oct. '35 (R. 29)			Grade 5 (R. 23).
J. E. Garrity (R. 3)		Dec. '35 (R. 31)		Yes	
Charlotte S. Gatewood (R. 3)		Oct. '35 (R. 30)		Yes	
J. S. Geiger (R. 3)	Yes				
Bernard A. Giesler (R. 3)	Yes				

Plaintiffs	Dis- missed (R. 38, 44)	Date of reclassifi- cation from Grade 5 to Grade 4	Clearly requested such re- classifi- cation (R. 22, 23-24)	Can obtain adminis- trative restora- tion (R. 12, 18)	Present status of plaintiffs who are not now in ter- minals at Grade 4
1	2	3	4	5	6
J. LeLand Gilliland (R. 3)		Oct. '35 (R. 30)		Yes	
Albert Glasser (R. 3)		Nov. '35 (R. 31)		Yes	
Francis Glynn (R. 3)	Yes				
Robert E. Goldman (R. 3)		Oct. '35 (R. 30)	Yes		
William R. Grim (R. 3)		Dec. '35 (R. 31)		Yes	
Anthony Haase, Jr. (R. 3)		Nov. '35 (R. 31)			Grade 6 (R. 23).
Louis Habel (R. 3)		Oct. '35 (R. 29)		Yes	
Samuel H. Hadley (R. 3)		Mar. '35 (R. 28)			Grade 5 (R. 23).
Vincent A. Hagerty (R. 3)	Yes				
Charles E. Hails (R. 3)	Yes				
Leonidas H. Hall (R. 45)		Oct. '35 (R. 30)		Yes	
Murdock Hall (R. 3)		May '35 (R. 28)			Grade 5 (R. 23).
Charles Haller (R. 4)		Nov. '35 (R. 31)		Yes	
Christine Hallgrimson (R. 4)	Yes				
Clyde C. Hammers (R. 4)		Oct. '35 (R. 29)		Yes	
George L. Hammond (R. 4)	Yes				
John S. Hanna (R. 4)	Yes				
J. A. Harris (R. 4)	Yes				
Robert E. Harrison (R. 4)	Yes				
James F. Hart (R. 4)	Yes				
Oscar Hartman (R. 4)		Dec. '35 (R. 31)	Yes		
William H. Hauer (R. 4)		Nov. '35 (R. 31)		Yes	
Weston W. Hawkins (R. 4)		Aug. '37 (R. 32)		Yes	
James E. Hedger (R. 4)	Yes				
E. F. Hein (R. 4)	Yes				
Selmer E. Helleland (R. 4)	Yes				
John W. Heran (R. 4)		Oct. '35 (R. 29)		Yes	
Thomas F. Hereiley (R. 4)		Feb. '36 (R. 31)	Yes		
W. C. Hewitt (R. 4)	Yes				
Cecil M. Hiatt (R. 4)	Yes				
William L. Hibbs (R. 4)		Oct. '35 (R. 29)		Yes	
Hubert M. Hinant (R. 4)	Yes				
Wiley Hitchcock (R. 4)		Oct. '35 (R. 29)		Yes	
Gordon H. Hodgson (R. 45)		Mar. '35 (R. 28)		Yes	
Chris Hoehtenbach (R. 4)	Yes				
James A. Holt (R. 45)		Oct. '35 (R. 29)			Grade 5 (R. 23).
George A. R. Horsley (R. 4)	Yes				
Dorsey A. Hoskins (R. 4)	Yes				
John Housman (R. 4)	Yes				
George L. Hoyer (R. 4)		Oct. '35 (R. 29)		Yes	
Walter D. Hubley (R. 4)		Oct. '35 (R. 29)			Retired (R. 22).
J. W. Huckenpaehler (R. 4)	Yes				
Otto C. Huffman (R. 4)		June '35 (R. 28)			Grade 5 (R. 23).
James M. Hughes (R. 4)		Oct. '35 (R. 29)		Yes	
Ira Hunt (R. 4)	Yes				
Henry M. Igon (R. 4)		Sept. '35 (R. 28)	Yes		
Joseph W. Jackson (R. 4)		Oct. '35 (R. 29)		Yes	
Stanley A. Jackson (R. 45)		Feb. '38 (R. 32)		Yes	
Jacob I. Jacobson (R. 4)		Oct. '35 (R. 30)		Yes	
Frank W. Joesten (R. 4)		Sept. '37 (R. 32)	Yes		Retired (R. 22).
Clarence S. Johnson (R. 4)		Oct. '35 (R. 29)		Yes	
Joseph H. Johnson (R. 4)		Nov. '35 (R. 31)		Yes	
Theodore Johnson (R. 4)		Oct. '35 (R. 30)		Yes	
Francis H. Johnston (R. 4)		Oct. '35 (R. 29)			Grade 5 (R. 23).

Plaintiffs	Dis- missed (R. 38, 44)	Date of reclassifi- cation from Grade 5 to Grade 4	Clearly requested such re- classifi- cation (R. 22, 23-24)	Can obtain adminis- trative restora- tion (R. 12, 18)	Present status of plaintiffs who are not now in ter- minals at Grade 4
1	2	3	4	5	6
Errol C. Jump (R. 4).....		Dec. '35 (R. 31)....	Yes		
George J. Kafader (R. 4).....		Nov. '35 (R. 31)....		Yes	
George A. Kalmbacher (R. 4).....		Nov. '35 (R. 31)....	Yes		
William H. Kammann (R. 4).....		Oct. '35 (R. 30)....			Grade 5 (R. 23).
Ed Bieden Kapp (R. 4) [See Edmund Bieden Kapp].					
George H. Keenan (R. 4).....		Oct. '35 (R. 30)....			Grade 5 (R. 23).
Thomas Kelly (R. 4).....		Oct. '35 (R. 30)....		Yes	
Archie L. Kendall (R. 4).....		Oct. '35 (R. 30)....			Grade 5 (R. 23).
Joseph L. Kenefick (R. 45).....	Yes				
William H. Kettering (R. 4).....		Oct. '35 (R. 29)....		Yes	
Ernest L. Kief (R. 5).....		Oct. '35 (R. 29)....			Grade 5 (R. 23).
Ole B. Kilen (R. 5).....		Mar. '36 (R. 31)....			Grade 5 (R. 23).
William A. Kinevale (R. 5).....		Oct. '35 (R. 30)....		Yes	
Lloyd A. Kinyon (R. 45).....		Oct. '35 (R. 29)....			Grade 5 (R. 23).
Lawrence V. Kirk (R. 5).....	Yes				
Helen F. Knox (R. 5).....	Yes				
Joseph Koelsch (R. 5).....		Nov. '35 (R. 31)....		Yes	
George W. Krahe (R. 5).....		Nov. '35 (R. 31)....		Yes	
Joseph W. Kreiner (R. 5).....		Dec. '35 (R. 31)....	Yes		
R. C. Krueger (R. 5).....		June. '35 (R. 28)....		Yes	
Henry Kuhn (R. 5).....	Yes				
Hubert Kyckelhahn (R. 5).....		Dec. '35 (R. 31)....		Yes	
Arthur A. Lane (R. 5).....		Oct. '35 (R. 29)....	Yes		
Herbert A. Lang (R. 5).....	Yes				
Charles A. Langston (R. 5).....		Nov. '35 (R. 31)....		Yes	
Thomas E. Leach (R. 5).....		Oct. '35 (R. 29)....	Yes		
G. W. Leaf (R. 5).....	Yes				
Harold A. Lewis (R. 45).....		Dec. '35 (R. 31)....			Grade 5 (R. 23).
Henry L. Lober (R. 5).....		Oct. '35 (R. 30)....		Yes	
William H. Lockett (R. 5).....	Yes				
Aubrey G. Lockhart (R. 5).....		Oct. '35 (R. 29)....		Yes	
Walter C. Lohman (R. 5).....		Oct. '35 (R. 29)....			Grade 5 (R. 23).
Frank E. Lydon (R. 5).....		Dec. '35 (R. 31)....		Yes	
Peter J. Lynch (R. 5).....		Oct. '35 (R. 29)....		Yes	
Fred L. McChesney (R. 5).....		Nov. '35 (R. 31)....	Yes		
Russell B. McClelland (R. 5).....	Yes				
Ernest C. McCullough (R. 5).		Oct. '35 (R. 29)....		Yes	
Thomas D. McKinney (R. 5).	Yes				
Thomas A. McKnight (R. 5).....	Yes				
Charles W. McMellon (R. 5).....	Yes				
William L. Marshall (R. 5).....		June '35 (R. 28)....		Yes	
W. J. Martens (R. 5).....	Yes				
D. E. Meadows (R. 5).....		Oct. '35 (R. 29)....		Yes	
Louis H. Meier (R. 5).....		Oct. '35 (R. 29)....		Yes	
Charles D. Melloy (R. 5).....		Oct. '35 (R. 29)....		Yes	
Frederic M. Metzger (R. 5).....		Oct. '35 (R. 29)....	Yes		
Adam J. Michalski (R. 5).....		Oct. '35 (R. 30)....		Yes	
James R. Miles (R. 5).....		Oct. '35 (R. 29)....		Yes	
Clifford H. Miller (R. 5).....		Oct. '35 (R. 29)....		Yes	
William A. Miller (R. 5).....		Oct. '35 (R. 29)....		Yes	
George S. Milliken (R. 5).....		Apr. '35 (R. 28)....		Yes	

Plaintiffs	Dis- missed (R. 38, 44)	Date of reclassifi- cation from Grade 5 to Grade 4	Clearly requested such re- classifi- cation (R. 22, 23-24)	Can obtain adminis- trative restora- tion (R. 12, 18)	Present status of plaintiffs who are not now in ter- minals at Grade 4
1	2	3	4	5	6
Frank C. Minar (R. 5)		Mar. '36 (R. 31)		Yes	Nondistributor (R. 25).
Leslie M. Moore (R. 5)		Dec. '35 (R. 31)		Yes	
Alfred S. Morgan (R. 45)		Aug. '34 (R. 28)	Yes		
Colby O. Morgan (R. 5)	Yes				
Thomas B. Mulligan (R. 5)		Oct. '35 (R. 29)		Yes	Resigned (R. 22).
John F. Munger (R. 5)		Mar. '36 (R. 31)		Yes	
Philip Munkenbeck (R. 5)	Yes				
T. Emory Myers (R. 5)		Oct. '37 (R. 32)			
James F. Needham (R. 6)	Yes				Retired (R. 22).
Mary L. Nicholson (R. 6)	Yes				
Kate I. Nugent (R. 6)		Oct. '35 (R. 30)		Yes	
Joseph P. O'Brien (R. 6)		Oct. '35 (R. 30)		Yes	
Herbert Odom (R. 6)	Yes				
William T. Oliver (R. 6)		Aug. '35 (R. 28)	Yes		
Anthony Olivet (R. 6)		Oct. '35 (R. 30)		Yes	
Fern B. Orrell (R. 6)		Dec. '35 (R. 31)		Yes	
Farragut Owens (R. 6)		Dec. '34 (R. 28)			
Hiram E. Parker (R. 45)		Oct. '35 (R. 29)		Yes	
John M. Parks (R. 6)		Oct. '35 (R. 29)		Yes	
Robert F. J. Patton (R. 6)		Oct. '35 (R. 30)		Yes	
Robert Pauls (R. 6)	Yes				
H. Howard Peabody (R. 6)	Yes				
Robert J. Pendergast (R. 6)	Yes				
C. Pericht ¹ (R. 6)		Oct. '35 (R. 29)		Yes	Grade 5 (R. 23).
Rupert B. Perry (R. 6)	Yes				
Harry T. Phelps (R. 6)		Nov. '35 (R. 31)		Yes	
Albert R. Phillips (R. 6)	Yes				
Joseph Pierrie (R. 6)	Yes				Grade 5 (R. 23).
Lester E. Pike (R. 6)		Oct. '35 (R. 29)			
Ralph W. Pittman (R. 45)		Feb. '38 (R. 32)		Yes	
Nicholas A. Plenchner (R. 6)		Mar. '36 (R. 31)			
Edward A. Point (R. 6)		Mar. '35 (R. 28)			Grade 5 (R. 23).
Jesse D. Pollock (R. 6)		Oct. '35 (R. 29)		Yes	Grade 5 (R. 23).
Ernest F. Powell (R. 6)		Dec. '35 (R. 31)		Yes	
Albert F. Prain (R. 6)	Yes				
Lena M. Printz (R. 6)		Nov. '35 (R. 31)		Yes	
Rodney Pryor (R. 6)	Yes				Grade 5 (R. 23).
Lee A. Purdy (R. 6)		May '35 (R. 28)		Yes	
Richard H. Quicke (R. 6)		Oct. '35 (R. 29)		Yes	
Leland S. Rackliffe (R. 6)		Oct. '35 (R. 30)			
Lester Radlow (R. 6)		Nov. '35 (R. 31)			Grade 5 (R. 23).
Owen A. Regan (R. 6)		Oct. '35 (R. 30)		Yes	Grade 5 (R. 23).
Samuel L. Regenbogen (R. 45).		Dec. '35 (R. 31)		Yes	
James J. Reilly (R. 6)	Yes				
John E. Reuss (R. 6)		Oct. '35 (R. 29)			
A. F. Rezabek (R. 6)		Dec. '35 (R. 31)		Yes	Grade 5 (R. 23).
Horace B. Riley (R. 45)		Feb. '38 (R. 32)		Yes	
Edith D. Rivero (R. 6)		Dec. '35 (R. 31)		Yes	
Buren Roberts (R. 6)		Oct. '35 (R. 30)	Yes		
Charles B. Robinson (R. 6)	Yes				Grade 5 (R. 23).
Shird Rodabaugh (R. 6)	Yes				

¹ Voluntarily withdrew from the action (R. 44) but was later reinstated as a party plaintiff (R. 45).

Plaintiffs	Dis- missed (R. 38, 44)	Date of reclassifi- cation from Grade 5 to Grade 4	Clearly requested such re- classifi- cation (R. 22, 23-24)	Can obtain adminis- trative restora- tion (R. 12, 18)	Present status of plaintiffs who are not now in ter- minals at Grade 4
1	2	3	4	5	6
Charles R. Rose (R. 6)		Oct. '35 (R. 30)			Grade 6 (R. 23).
Osimer C. Rose (R. 6)		Dec. '35 (R. 31)	yes		
Charles M. Rowan (R. 6)	Yes				
Elmer F. Rowe (R. 6)		Oct. '35 (R. 30)		Yes	
Clellia I. Rundle (R. 6)	Yes				
A. L. Rutherford (R. 6)		Oct. '35 (R. 30)		Yes	
John Salvato (R. 6)		Nov. '35 (R. 31)		Yes	
John M. Sands (R. 6)		Oct. '35 (R. 30)		Yes	
Nathan C. Sansing (R. 7)	Yes				
Edward F. Sartor (R. 7)	Yes				
Irene Schat (R. 7)	Yes				Grade 5 (R. 23).
George L. Schauble (R. 7)	Yes				
Ferdinand H. Scheiner (R. 7)		Nov. '35 (R. 31)		Yes	
Carl J. Scherrer (R. 7)	Yes				
Harry Schlanger (R. 7)		Nov. '35 (R. 31)		Yes	
Joseph F. Schmierer ¹ (R. 7)		Nov. '35 (R. 31)		Yes	
Grover Schroeder (R. 7)		Oct. '35 (R. 30)		Yes	
Julius Schweitzer (R. 7)		Oct. '35 (R. 30)		Yes	
Thomas E. Scott (R. 7)		May '35 (R. 28)		Yes	
Frank Scrivani (R. 7)	Yes				Retired (R. 22).
Joseph A. See (R. 7)		Oct. '35 (R. 30)		Yes	
R. W. Seymour (R. 45)		Oct. '35 (R. 30)		Yes	
George Sharrett (R. 7)		Oct. '35 (R. 30)		Yes	
William H. Signor, Jr. (R. 7)		Oct. '35 (R. 30)		Yes	
Frank L. Simpson (R. 7)		Nov. '35 (R. 31)	Yes		
V. L. Sisk (R. 7)	Yes				
Joseph W. Skiles (R. 45)		Oct. '35 (R. 30)		Yes	
Fred N. Slaughter (R. 7)		Oct. '35 (R. 30)		Yes	
Lawrence O. Small (R. 7)		Oct. '35 (R. 30)		Yes	
Allen R. Smith (R. 7)		Oct. '35 (R. 30)		Yes	Retired (R. 22).
Guy M. Smith (R. 7)	Yes				
Lee R. Smith (R. 7)	Yes				
Ray Smith (R. 7)		Oct. '35 (R. 30)		Yes	
Joseph Sollberg (R. 7)	Yes				
Melvin L. Sorem (R. 7)		Oct. '35 (R. 30)			
Samuel Sorin ¹ (R. 7)		Mar. '35 (R. 28)		Yes	
Irby Sorrells (R. 7)		Oct. '35 (R. 30)		Yes	
Lawrence Spangler (R. 7)	Yes				
D. C. Sparks (R. 7)	Yes				
Clifford D. Staller (R. 7)	Yes				Retired (R. 22).
H. D. Stanley (R. 7)	Yes				
Thomas E. Stanton (R. 7)		Oct. '35 (R. 30)		Yes	
Andrew Stauffacher (R. 7)		Dec. '35 (R. 31)		Yes	
Robert Stevenson (R. 7)		Nov. '35 (R. 31)		Yes	
Otis J. Stickles (R. 45)		Feb. '38 (R. 32)		Yes	
Hubert G. Stillwell (R. 7)	Yes				
K. J. Stokes (R. 7)		Oct. '35 (R. 30)		Yes	
Ernest L. Stowe (R. 7)		Dec. '35 (R. 31)	Yes		
H. B. Stowe (R. 7)		Dec. '35 (R. 31)		Yes	
Leigh H. Straw (R. 7)	Yes				Retired (R. 22).
Edward G. Stringer (R. 7)		Apr. '38 (R. 32)	Yes		

¹ Voluntarily withdrew from the action (R. 44), but was later reinstated as a party plaintiff (R. 45.)

Plaintiffs	Dis- missed (R. 38, 44)	Date of reclassifi- cation from Grade 5 to Grade 4	Clearly requested such re- classifi- cation (R. 22, 23-24)	Can obtain adminis- trative restora- tion (R. 12, 18)	Present status of plaintiffs who are not now in ter- minals at Grade 4
1	2	3	4	5	6
John Q. Stuart (R. 7)		Oct. '35 (R. 30)		Yes	
William L. Sutton (R. 7)		Oct. '35 (R. 30)		Yes	
Thomas H. Sykes (R. 7)	Yes				
Leslie R. Talbott (R. 7)		Aug. '35 (R. 28)	Yes		Grade 5 (R. 23).
Joseph A. Tax (R. 7)		Mar. '36 (R. 31)		Yes	
M. M. Then (R. 7)		Oct. '35 (R. 30)		Yes	
John Timmes (R. 7)		Nov. '35 (R. 31)		Yes	
Jervis N. Tittensor (R. 45)		Nov. '35 (R. 31)			Grade 5 (R. 23).
Daniel F. Toomey (R. 8)	Yes				
William Van Kirk (R. 8)	Yes				
Charles L. Vineall (R. 8)	Yes				
Joseph B. Volmer (R. 8)		Oct. '35 (R. 30)		Yes	
Harry Vriesema (R. 8)	Yes				
J. Clay Walker (R. 8)	Yes				
W. W. Walker (R. 8)		Dec. '35 (R. 31)		Yes	
Forest Ward (R. 8)		Oct. '35 (R. 30)		Yes	
William J. Warnecke (R. 8)	Yes				
James A. Washington (R. 8)		July '35 (R. 28)			Grade 5 (R. 23).
William F. Watkins (R. 8)		Oct. '35 (R. 30)		Yes	
John Weiskittel (R. 8)		Oct. '35 (R. 30)		Yes	
Elias W. T. Whitlock (R. 8)		July '35 (R. 28)			Grade 5 (R. 23).
Ralph Wickham (R. 8)		Dec. '34 (R. 28)		Yes	
Hugh L. Wilcox (R. 8)		Dec. '35 (R. 31)		Yes	
Martin H. Wildhaber (R. 8)	Yes				
Irving E. Willett (R. 45)		Oct. '35 (R. 30)			Grade 5 (R. 23).
Miles D. Williamson (R. 8)		Oct. '35 (R. 30)		Yes	
A. W. Wisczarek (R. 8)	Yes				
Thorwald Wogelius (R. 8)	Yes				
Theodore E. Wolfe (R. 8)		Oct. '35 (R. 30)		Yes	
Ralph Woodruff (R. 8)		Dec. '35 (R. 31)	Yes		
Valentine Yagle (R. 8)		Oct. '35 (R. 30)		Yes	
George H. Yale (R. 8)		Mar. '35 (R. 28)		Yes	
Clive J. York (R. 8)		Nov. '35 (R. 31)	Yes		
D. V. Young (R. 8)		June '36 (R. 32)	Yes		
Lewis H. Young (R. 8)	Yes				
John Ziegler (R. 8)		Apr. '35 (R. 28)			Grade 5 (R. 23).
Charles Zikes (R. 8)	Yes				
Dena Zopp (R. 8)	Yes				

B.

Statement of appellant's position as to question of whether seniority standing is included within the meaning of the word "rank" as used in the 1934 Act

The Railway Mail Service recognizes two kinds of seniority as to Grade 5 clerks, i. e., (1) the relative lengths of their respective periods of employment in the Railway Mail Serv-

ice; and (2) the relative lengths of their assignments to particular offices in that Service.

So far as we are aware, no express reference to seniority is contained in any legislation relating to the Postal Service, and no legal right is made to turn upon seniority either by law or by the departmental regulations promulgated by the Postmaster General. Neither the Act of June 5, 1934, c. 393, 48 Stat. 880 (39 U. S. C. 626), nor section 2013.15-17 of the Postal Laws and Regulations prescribing the qualifications to be considered in making administrative promotions, mentions seniority. However, as a matter of practice, it is customary to promote the senior clerk if the prescribed ratings of the two best qualified clerks under consideration for a vacancy are equal.

The seniority "rights" which have grown up as a matter of usage in the Railway Mail Service have been given recognition in the so-called Seniority Rules of the Railway Mail Service which are promulgated and amended from time to time by, and at the discretion of, the General Superintendent, and they will be found in the handbook of that Service if the Court feels that they are proper subjects for judicial notice.¹ Under such rules the senior clerk in a particular office is usually given first choice of working hours and duty assignments upon its reorganization (see appellees' brief, p. 26) and the choices of senior clerks are usually honored in connection with transfers to other offices and the like (see, e. g., the instructions involved in this case at R. 35, and the Congressional committee reports at top R. 21).

In using the word "rank" in the Act of June 14, 1934, the Congress intended to protect the clerk's *legal* status. As pointed out in appellant's previous brief at page 27, the *proviso* in question was carried forward from the 1925 Act which was, in effect, amended in the 1934 Act. Section 7 of the 1925 Act (appellant's brief, p. 32), is in part, as follows:

All original appointments shall be made to the *rank* of substitute railway postal clerk . . . [Italics supplied.]

¹ Copies of the handbook will be supplied on request.

Also, the reason for the use of the phrase "rank or salary" is clear. The 1925 Act constituted the "first *complete* reclassification in the history of the Postal Service" (65 Cong. Rec. 10190) and included employees who could be reduced in rank without changing their salary or could be reduced in salary without changing their rank (see, e. g., Sec. 6, 43 Stat. 1060; 39 U. S. C. 116). The word "grade" was not used because many classifications were not made by grades, e. g., "superintendents" (*Ibid.*). Cf. *Farley v. Welch*, 67 App. D. C. 382, 92 F. 2d 533, 537.

The fact that the Congress continued to have the same understanding of the meaning of the word "rank" at the time the Terminal Reclassification Act of June 14, 1934, was enacted, namely, as referring to title and grade, is shown by the Act of June 5, 1934, c. 393, 48 Stat. 880 (39 U. S. C. 626), which is, in part, as follows:

* * * clerks assigned as *assistant chief clerks* and
clerks in *grade 6*, or higher *rank*, * * * shall
* * * be eligible for promotion * * * [Italics
supplied.]

It is clear that by the use of the word "rank" the Congress did not intend that transferred Grade 5 clerks should be given the same relative seniority "standing" in the offices to which they were to be transferred that they had in the terminals because that would be impossible under the provision of the Act:

That no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this Act.

The senior clerk in a terminal could not be transferred to and treated as the senior clerk in another office without "reducing" the seniority standing of the previous senior clerk in that office, etc. down the line. Thus if "rank" had been intended to include seniority "standing," such transfers would be impossible under the Act, but since it is clear (R. 19) that such transfers were intended to be made, it is not to be assumed that the word "rank" was intended to have a meaning pre-

cluding that result. (Cf. e. g., *United States v. Ryan*, 284 U. S. 167, 175.) It is clear from the committee reports (at R. 19) that transfers were not considered to involve reductions in rank and it would seem (from R. 21) that the committees were acquainted with the seniority rules.

As a matter of fact, the relative age of a clerk either in the service or in a particular office is a *fact*, and his "rank" in that sense, cannot be reduced. If his "rights" are changed by reason of his transfer to a new office, that is a result of the operation of the very seniority rules upon which such "rights" depend. It is not a reduction in his "rank."

It seems clear, therefore, that the word "rank" as used in the Terminal Reclassification Act has reference to relative administrative levels *established by law*, and that it was not intended to include the so-called seniority "standing" of the clerks.

C

Letter from the Postmaster General

FEBRUARY 5, 1940.

The Honorable The Attorney General.

MY DEAR MR. ATTORNEY GENERAL: The Solicitor of the Post Office Department advises me that reassurances are desired in connection with the case of *Farley v. Abbetmeier et al.*, now pending in the United States Court of Appeals for the District of Columbia, to the effect that the taking of an administrative appeal to my office pursuant to Section 10 of the Postal Laws and Regulations is not conditioned upon compliance with any technical requirement as to procedure or limitation of time.

Please be assured that the right of appeal is not and, so far as I am aware, never has been conditioned upon compliance with any technical requirement whatsoever.

Since I have occupied this office an average of about three or four administrative appeals relating to personnel matters have been taken each week. I think it is safe to say that such appeals have been taken by clerks attached to practically every office in the Postal Service, and they have been con-

cerned with a wide range of subjects, including many alleged wrongful reductions in grade.

While such appeals can be taken by clerks by writing their requests through their immediate superiors, it is my impression that the majority of them have been taken directly by letters addressed to the Postmaster General. Many complaints have been brought to my attention by telegram, telephone calls, and personal interviews.

Very truly yours,

JAMES A. FARLEY,
Postmaster General.